TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 222.

DAVID WELLS, THOMAS BALLANTYNE, CHARLES M. GILBERT, JOHN H. GILBERT, WILLIAM KEHOE, HENRY BLUN, DANIEL G. PURSE, ROBERT McINTYRE, MARY E. DOUGLASS, AND DENNIS O'CONNELL, PLAINTIFFS IN ERROR,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH AND ROBERT J. WADE, CITY MARSHAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

FILED MARCH 10, 1900.

(17,669.)

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1 STATE OF GEORGIA, }
Chatham County. }

To the superior court of said county:

The petition of David Wells, Thomas Ballantyne, Charles M. Gilbert and John H. Gilbert, William Kehoe, Henry Blun, Daniel G. Purse, Rob't McIntire, Mrs. Mary E. Douglass, and Dennis O'Connell, who sue for themselves and all others who may come into said cause and become parties hereto and contribute to the costs and expenses hereof, respectfully shows:

That your petitioners are holders of certain lots of land in the city of Savannah, county of Chatham and State of Georgia, known as "City lots" or "Leased lots," the lots and respective holders being set out more fully in the exhibit or schedule hereto annexed, marked "Exhibit A," which is made a part of this their petition, and to which your petitioners pray leave to refer as occasion may require.

And your petitioners show that the lots held by them respectively were granted or leased by the mayor and aldermen of the city of Savannah under the terms hereinafter mentioned, and that your petitioners are the assignees or grantees holding under transfers from those who made the original contract with the said corporation, and hold their respective lots under the original contract of lease.

Your petitioners further show that the said lots of land were originally a part of the common attached to the city of Savannah, which was from time to time divided into lots and squares with street intersections in conformity to and corresponding with the original plan of said city, and were disposed of by the mayor and aldermen of the city of Savannah and hamlets thereof, the first of said sales having been made under and by virtue of an act of the General Assembly of the State of Georgia approved February 10th, 1787, authorizing the then wardens of the city of Savannah
2 to let, lease, or rent at public sale any lot or lots of land and other specific property in said city, and by virtue of an ordinance passed in council on the twenty-eighth day of September, 1790, whereby all of the east and a part of the west common situate and lying between Bay and Broughton streets, extending easterly and westerly to public streets one hundred feet in width, were divided into eighty (80) lots on the east and forty (40) lots on the west, and were disposed of under the following terms and conditions:

The said lots were valued, according to an estimate or schedule, from one hundred and sixty pounds to forty pounds sterling money, and the ground rent for the same was to be in proportion and after the rate of five pounds sterling money per annum on every one hundred pounds value—that is to say, at the rate of five per cent. per annum on the valuation, the purchaser having the option of paying down the valuation money or to hold his purchase on ground rent payable quarterly, and in the event the purchase-money was paid down the purchaser became entitled to the absolute estate in

fee-simple; but in the event of the purchaser electing to hold his purchase on a ground rent the use and occupation of the premises were forever secure to the purchaser and others claiming under him on payment of the ground rent, but upon failure to pay the said ground rent, at the expiration of fifteen days' notice after the same became due, the said premises were to revert to the said mayor and aldermen of the city of Savannah, who should immediately thereafter possess the power of re-entry, and having by means of its proper officer exercised such power and given the proper notice thereof in writing posted on the premises, the lot or lots so entered upon, with all the improvements thereon, were to be considered, at the expiration of ten days thereafter, as absolutely revested in the said mayor and aldermen of the city of Savannah.

Your petitioners further show that from time to time other
3 portions of the city common were laid out into lots and the said lots sold upon the same terms substantially and essentially as are contained in the ordinance of September 28th, 1790; which said sales, "whether in fee-simple or otherwise," were confirmed by an act of the General Assembly of the State of Georgia, approved December 21st, 1822.

Your petitioners further show that the said corporation executed and delivered to said purchasers as elected to hold their purchase on ground rent a deed of lease whereby the said corporation conveyed to the said purchaser the premises so purchased by him, to him, his executors, administrators, and assigns, forever, on this express condition: that said purchaser should pay by four equal and quarter-yearly payments into the city treasury of Savannah aforesaid the sum of — dollars as ground rent for the use and occupation of said lot and premises, and in case of failure herein for the space of — days after any of the quarterly payments shall become due the said lot and premises to revert to the corporation, who shall immediately thereafter possess the power of re-entry, and, having by means of its proper officer exercised such power and given the notice in writing posted on the premises, said lot, with all improvements thereon, shall be considered at the expiration of ten days thereafter as absolutely revested in the corporation and the estate created determined to all intents and purposes as fully as if the same had not been bargained for or purchased; and the purchaser, for himself, his heirs, executors, and administrators, in said deed covenanted and agreed with the said mayor and aldermen of the city of Savannah that the annual ground rent shall be well and truly paid into the city treasury by quarterly payments aforesaid, and in case of failure it should be lawful for such re-entry to be made and such proceedings be used as under and by said ordi-
nance and the condition aforesaid are pointed out and
4 directed; and it was in said instrument declared to be the true intent and meaning thereof and of the parties to the same that on the payment of the said ground rent at the times and after the manner hereinbefore prescribed and directed that the said purchaser, his heirs, executors, administrators, and assigns, should and might from time to time and at all times thereafter

peaceably and quietly have, hold, use, occupy and possess, and enjoy the lot and premises and receive and take the rents, issues, and profits thereof to his own use absolutely, without let, suit, trouble, eviction, or denial of the said corporation or of any person or persons whatsoever acting under it or by virtue of its authority, subject only to such assessments and burdens as should be common to other lot-holders in said city.

And it was further provided and agreed that it should at any future time be in the power of the purchaser, his heirs, executors, administrators, or assigns, if he or they should so incline, to pay the valuation money to the city treasurer, with what rent may be due up to that time, in full discharge and extinguishment of said ground rent, and upon said payment, evidenced by the receipt of the city treasurer, there shall then and from thenceforth vest the absolute estate in fee-simple in said lot and premises in the purchaser, his heirs and assigns, to his and their only proper use and behoof forever.

And your petitioners further show that upon the execution and delivery of the said instrument or deed of lease that the relation of landlord and tenant thereby became established between the said corporation and the holders of said lots, the absolute title remaining in the corporation, and the holders obtaining a perpetual lease to them, their executors and assigns, so long as they should pay the rent.

Your petitioners aver that the said corporation intended
5 to reserve the fee-simple title to said lots when the option of the purchaser was declared to be to hold the same under rent, and to convey to the purchaser only an assignable perpetual lease, determinable only on default in the payment of rent; that there was no other ground or right of forfeiting reserved in the lease or in the ordinance under which said lots were leased or sold, as the option of the purchaser might determine.

Your petitioner- further show that such has been the uniform, continuous, and expressed construction placed on the tenure by which said lots are held by the said corporation from the time of the first letting by public sale until the present time.

And your petitioners show that the present board of mayor and aldermen have assumed a different attitude towards the holders of said lots.

Your petitioners further show that said lots have commonly been designated by the said corporation in its various ordinances as "lots held under lease;" that the act of 1822, ratifying the disposition of the said town common made up to that time by said city, recognized the distinction or difference between such lots as were disposed of in fee-simple and those not so disposed of; that the published and authorized reports of the mayors of the city of Savannah have declared the said lots to be property of the city, leased by it, and rendering a certain annual rent, and not subject to taxes, and the said corporation has exercised the legal right of landlord appertaining to that relation and estate at law not set forth in the instrument of lease by declining to sublet or recognize

subtenants except in such subdivisions of said lots as the said corporation choose to permit.

And your petitioners further show that at the time of the sales or leasing at public outcry the said corporation did, by its officers thereto duly authorized, publicly announce to the bidders that lots disposed of under ground-rent plan were not subject to city taxes, and the said corporation from the time of the sale of said lots under lease up to this time have collected regularly the ground
6 rents due for said lots, having retained the absolute title, and have from time to time, upon default in the payment of ground rent, exercised its right as landlord and owner to re-enter upon the premises, to determine the estate of the tenant, and to retake and resume possession of said lots, and have never before attempted to levy and collect a city tax upon any of said lots so held under ground rent.

Your petitioners further show that the fee-simple title of the said lots being in the said corporation, and the holders thereof being in fact and virtually tenants thereof, that the said lots are subject only to the payment of the annual ground rent to the city of Savannah, and are not subject to the payment of any other charges to the city of Savannah, and have always been free from taxation by said corporation, and cannot be taxed by said corporation nor any other revenue derived to said corporation from the said lots then the ground rent reserved under the ordinances and the deed of lease.

Your petitioners further show that under the express covenant in the said lease the said corporation warrants to the holders of said lots uninterrupted use, occupation, and enjoyment of the same to their own use absolutely without any let, suit, trouble, eviction, or denial from the corporation so long as they shall pay ground rent on the same whenever the same shall become due, and that the said corporation reserved no right or power than the collection of the ground rent and the right to re-entry in case of default in the payment of the same.

That the covenant in said instrument that the same shall be subject only to such assessments and burdens as are common to other lot-owners did not refer to any taxes that might be levied by the city of Savannah, but only to such assessments and burdens as the city of Savannah might be called upon to bear as the owner of said lots in common with the holders of other lots, which assessments and burdens the said holders of said ground rent lots have always
7 assumed and borne, so that the said corporation has received its rent in full and without any deduction or diminution by reason of any assessment or burden made on said lots in common with other lot-holders.

Your petitioners further show that this was the intention and meaning of the said instrument, and such was the construction and interpretation placed upon the same by the said mayor and aldermen of the city of Savannah from the time of the first sale of said lots and the execution of the deeds therefor in January, 1791, up to the time of the attempt of the present board of mayor and aldermen

to levy and collect a tax upon said lots in addition to the ground rent received therefor.

Your petitioners further show that the first ordinance which was passed by said corporation for the purpose of levying a tax upon the real estate in said city was the one adopted on the seventh (7th) day of April, 1806, which ordinance did attempt to levy a tax upon said lots held under lease from said corporation, with all other lots, improved and unimproved, in said city, but that before said ordinance was enforced or any taxes assessed and levied thereunder the same was referred to a special committee of council to report upon the same what amendments were necessary, and after mature consideration the committee reported by an amended ordinance, which was adopted on the twenty-fourth day of November, 1806, which declared that lots held under lease from said corporation should be exempt from city taxes; which declarations and admissions on the part of the mayor and aldermen of the city of Savannah that said lots were not subject to taxation *was* reiterated and declared in the various ordinances levying taxes upon real estate in the city of Savannah and passed in council from the twenty-fourth day of November, 1806, until the right of exemption from taxation by virtue of the relation existing between the said corporation and the holders of said lots, and the said interpretation and construction of said contract had become fully estab-
8 lished and recognized; so that thereafter the taxes were levied upon taxable property, except such as are exempt from taxation by law.

Your petitioners further show that the construction placed upon the instrument by the corporation was reiterated and declared by the said corporation through its mayor and chief executive officer in his annual reports from time to time, whereby and wherein the said lots, known as ground-rent lots, were published and reported as being a portion of the "city domain" belonging to said corporation and forming a part of its assets and resources held under ground rent and not subject to taxation and producing a revenue from rent and not from taxation.

Your petitioners further show that your petitioners, relying upon the said ordinances and said contract and the said construction and interpretation placed thereon, and the other continuous, uninterrupted observance of the same, purchased at the time mentioned in said schedule the said several lots respectively owned by them, paying a valuable consideration, because said lots were subject only to ground rent and fixed charge, and have held the same under the said original contract, subject to said ground rent and free from city taxes, and that they have been in the quiet, peaceable possession of the same from the time of the purchase of the same, and have paid the ground rents, and are entitled to continue in the peaceable possession of the same without let, suit, trouble, eviction, or denial by the said corporation.

Your petitioners further show that the present board of mayor and aldermen of said corporation under the plea that it is their duty to impose a tax upon the same, not regarding the original

contract and the continuous, uninterrupted observance thereof by said corporation for a century, without warrant or authority and contrary to said contract and to the absolute impairment of the same, caused the said lots of your petitioners to be assessed
9 at a valuation greatly in excess of the valuation money mentioned in the original conveyance of lease, and have caused to be levied executions to collect a tax of one and one-half per cent. on said increased values in addition to the said ground rents, under the general tax ordinance of said city passed in council December 27, 1889, and have caused executions to be actually levied upon city lots held under the contract of lease aforementioned by your petitioners Daniel G. Purse, Charles M. Gilbert and John H. Gilbert, Henry Blun, and Robert McIntire, and threaten to proceed to levy upon the lots held by all of your petitioners and other holders of ground-rent lots to enforce the collection of said taxes.

First Amendment.

Your petitioners further show that the ordinance passed by the said mayor and aldermen imposing a tax upon the said ground-rent lots impairs the obligation of the contract made by the said mayor and aldermen under the ordinance and conveyance when said lots were originally disposed of by the said mayor and aldermen, and that said ordinance is unconstitutional, illegal, and void.

Amendment allowed.

In open court, April 25, 1898.

R. FALLIGANT, *Judge.*

Your petitioners further show that by virtue of said ordinances and the said deed of lease and the interpretation placed thereon by said corporation and the said lot-holders the said corporation has no power or authority to levy any tax upon property to which it retains the title and from which it derives revenue from
10 the rental thereof; and the said corporation, by the declarations in its ordinances from time to time adopted that said lots are not subject to taxation by the city, declarations made in its annual reports by the mayor of said city, and by the announcements made at the time of the sale of said lots by the city authorities authorized to make such sale, that said lots, if purchased upon the ground-rent plan, were not subject to taxation, and by the continuous exemption from taxation by said corporation, confirming the contract, declarations, and announcements, and by reason of the purchase by your petitioners of the said lots on account of such construction, interpretation, declarations, and announcements, the said corporation is forever estopped from attempting to levy any tax upon said property so long as the same is held under said lease and subject to ground rent.

Your petitioners further show that they have paid all city taxes on the improvements erected or owned by them on the said lots and do not owe the said corporation any amount whatever.

And your petitioners further show that under and by virtue of an execution issued by Charles S. Hardee, city treasurer, Robert

J. Wade, city marshal, has levied upon the property of your petitioners Daniel G. Purse, Charles M. Gilbert and John H. Gilbert, Henry Blun, and Robert McIntire to collect the amount of taxes alleged to be due upon the said lots of your petitioners last named held under lease from said corporation as aforesaid, and is about to make a levy of executions against your other petitioners based upon said alleged taxes claimed to be due by said corporation on the lots of your petitioners held under lease from said corporation as aforesaid.

11 *Second Amendment.*

Your petitioners further show that since the filing of their said petition praying for injunction and relief, their application for temporary injunction against the mayor and aldermen of the city of Savannah to restrain said municipal corporation from collecting the tax imposed by it upon the said city lots held by your petitioners and all other such lot-holders represented by your petitioners was refused, and the said city has collected, under execution and under protest of the said lot-holders, a large amount of taxes levied and assessed against said city lots, to wit, taxes on the sum of $1,340,640 or other large sum, aggregate valuation as per statement annexed, marked Exhibit "B," to which reference is prayed.

Your petitioners further show that the assessment, levy, and collection of said tax was illegal and in violation of the contract made by the said municipal corporation in the disposal of said city lots, which contract is fully set forth in the original petition filed by your petitioners, and that the same has been paid under duress.

Your petitioners further show that the amount of taxes paid by them respectively is more specifically set forth in the statement hereto attached, marked Exhibit "C," to which reference is prayed, amounting in the aggregate to six thousand seven hundred and fifty-five $\frac{85}{100}$ dollars.

Your petitioners pray that the amount due to your petitioners and all other holders of ground-rent lots represented by your petitioners in their petition may be ascertained by an auditor to be appointed by this honorable court, and that a judgment and decree may be entered up against the said mayor and aldermen of the city of Savannah in favor of your petitioners for the
12 amount that may be found to be due to them for said taxes so collected from them and received by the said defendant, with interest thereon.

Amendment allowed.

In open court, April 25, 1898.

R. FALLIGANT, *Judge.*

Wherefore your petitioners pray that the said mayor and aldermen of the city of Savannah be perpetually enjoined against levying the said executions, and that the said assessment of a city tax upon the said city lots so long as they shall be held under ground rent from the said corporation be decreed to be null and void, and

that the said mayor and aldermen of the city of Savannah be prohibited and enjoined from assessing any city tax on said ground-rent lots leased from said corporation so long as the same are held under lease from the said mayor and aldermen of the city of Savannah or from assessing and collecting any of the taxes levied under the tax ordinances of said city on said lots so long as they are held under leases from said city, and that your petitioners may have such other and further relief in the premises as the case may require or to this court shall seem meet and proper.

And your petitioners pray a temporary injunction or restraining order restraining the said mayor and aldermen of the city of Savannah and the said Rob't J. Wade, city marshal, from advertising or exposing for sale the said lots so levied on, as aforesaid, or from making any other levies on the property of your petitioners until the further order of this court.

And that process may issue requiring the said mayor and aldermen of the city of Savannah and Robert J. Wade, city marshal, to be and appear at the next term of the superior court of
13 Chatham county, then and there to answer your petitioners in the premises, discovery being expressly waived, and to stand to, abide by, — perform whatever this honorable court may order and decree in the premises.

J. R. SAUSSY,
Petitioners' Attorneys.

STATE OF GEORGIA, }
Chatham County. }

Personally appeared C. M. Gilbert, one of the plaintiffs in said petition, who, being sworn, says that the facts contained in the foregoing petition so far as the same concern his own act and deed are true of his own knowledge, and so far as concerns the act or deed of any other person he believes them to be true.

CHARLES M. GILBERT.

Sworn to and subscribed before me this 26 July, 1890.

R. D. WALKER, JR.,
Notary Public, Chatham County, Ga.

Petitioner.	Lot number and ward.	When sold by city.	When purchased by petitioner.		Valuation.	Increase money.	Total.
David Wells	46, Calhoun, 1	September 8, 1866		1	$1,700	$140	$1,840.00
	E. ½ 36, Chatham, 2	February 25, 1851		2	800	110	910.00
	E. ½ 61, Brown, 3			3	800	1	801.00
	37, La Fayette, 4	April 22, 1851		4	900	325	1,225.00
	30, Troup, 5	November 10, 1851		5	600	31	631.00
Thomas Ballantyne	66, Crawford	October 4, 1855		6	800	100	900.00
Charles M. Gilbert and John H. Gilbert.	W. ½ No. 7, Franklin, 7	January 13, 1791		7	750	304.28	1,054.28
	No. 8, Franklin, 8	January 13, 1791		8	685.71	45	730.71
William Kehoe	E. ½ 22, Columbia, 9	June 13, 1799		9	600	621	1,221.00
	E. part 30, Columbia, 10	June 18, 1799		10	200	650	850.00
Henry Blun	15, Crawford, E, 11			11	1,200	420	1,620.00
	10, Troup, E, 12	March 5, 1853		12	600	405	1,005.00
Daniel G. Purse	W. ½ 58, Brown, 13	November 18, 1830		13	600	1	601.00
Robert McIntire	E. ½ 19, Elbert, 14	June 2, 1801		14	700	75	775.00
	34, Franklin, 15	January 19, 1791		15	600	27.85	627.85
	E. ½ 6, Green, 16	August 15, 1799		16	200	516.00	716.00
	17, 18, 23, Liberty, 17	June 17, 1799	19	17	600	330	930.00
				18	600	340	940.00
				20	600	305	905.00
Mrs. Mary E. Douglass	5, Washington, 18	January 13, 1791		18	385.71	42.86	428.56
	E. ¾ 40, La Fayette, 19	April 24, 1853		19	950	355	1,305.00
Dennis O'Connell	½ 10, Warren ward, 20	January 13, 1791		20	300	643	306.43

15 "B."

Valuation of Ground-rent Lots.

Taken from city tax digest, exclusive of value of improvements.

	1890.	1891.	1892.	1893.	1894.	1895.	1896.	1897.
a	18750	15750	7850	7550	7550	7550	7250	7650
b	89040	92290	77490	77420	78170	80370	76855	74770
c	141670	146520	145870	139620	145370	148570	137420	141920
d	121850	126350	93050	99300	80400	87600	97000	91300
e	30300	30300	29300	24900	20900	24700	20700	27900
f	66500	66500	61850	72050	71050	71050	71050	70650
g	95715	91715	93965	91635	90835	90735	80695	90515
h	147451	129950	107700	107250	99100	102350	101850	101750
i	1200	1200	1200	1200	1200	1200	1200	1200
j	17300	17300	15400	13700	13700	13500	13500	20300
k	38800	39300	39850	40450	34450	43100	43100	43900
l	149950	107950	79800	81400	83600	83500	83900	83500
m	68600	69600	66900	81400	91450	100440	83350	78300
mc	65000	60900	60900	59500	56000	46050	53950	42900
n	27350	23550	22350	22350	22350	22350	22350	22350
o	14650	15650	13200	12000	12000	14000	14805	13300
p	55500	52950	41250	41250	48250	44850	44050	39100
q	8700	8700	8700	9500	9500	9500	9500	9500
r	121150	130400	128700	109530	101530	108130	106330	108550
s	108870	119970	122120	109095	106845	110090	119485	115725
t	45900	49700	43100	48300	41100	41300	41300	43100
u	3000	3000	3000	3000	3000	3000	3000	2000
v	4150	5350	4150	4150	4350	4150	4150	4150
w	116075	112075	112975	114150	113750	103400	118850	102250
x								
y								
z	2000	2000	2000	2000	2000	2000	2000	2000

16 **Totals are as follows:**

1890	$1595471
1891	1514070
1892	1382370
1893	1280300
1894	1338450
1895	1364485
1896	1357940
1897	1340640

"C."

City Taxes Paid on Valuation of Ground-rent Lots for Years 1890, '91.

	1890.	1891.	1892.	1893.	1894.	1895.	1896.	1897.	
Thomas Ballantyne:									
66 Crawford ward	$44.55	50 50	44.55	44.55	44.55	44.55	44.55	43.07	$360.87
Henry Blun:									
16 Crawford, east, transferred for 2, 1895									
E. ½ #10, Troup ward									
N. ½ #4, Warren ward	74.50	71.66	66.15	66.15	66.15	45.90	39.15	37.85	467.51
C. M. & J. H. Gilbert:									
3 Forsyth ward, transferred for 1892									
W. ½ #7, Franklin ward									
8, Franklin ward									
12 & 13, Franklin ward, added in 1892	139.75	139.75	147.25	131.63	131.63	131.63	131.63	127.24	1,080.51
Wm. Kehoe:									
S. ½ #23, Columbia ward									
E. pt. #30, " " W. ½ of E. pt.; transferred for '95	41.50	41.50	41.50	36.45	36.45	26.33	26.33	25.45	275.51
Rob't McIntire:									
E. ⅔ #19, Elbert ward; transferred for 4 yr., '96.									
34, Franklin ward " " "									
E. ½ #6, Greene "									
3, Liberty ward									
17, " "									
18, " " W. pt. transferred for 4 qr., '95									
23, " " transferred for 4 qr., '96	300.25	300.25	300.25	269.33	269.33	264.70	194.72	25.45	1,898.83
David Wells:									
E. ½ #61, Brown ward									
#46 & E. ½, Calhoun ward									
37, Lafayette ward									
30, Troup ward	226.00	226.00	226.00	202.50	202.50	202.50	202.50	195.75	1,683.75
D. G. Purse:									
W. ½ #58, Brown ward, transferred for 3 qr., '96	61.00	61.00	61.00	61.00	61.00	61.00	30.00	195.75	
	887.55	890.66	886.70	811.61	811.61	776.61	668.88	429.36	$6,162.98

SAVANNAH, GA., *April 22nd*, 1898.—The above statement is taken from the city records, and I believe it to be correct.

C. S. HARDEE, *City Treasurer.*

239

17 In Chatham Superior Court.

DAVID WELLS ET AL.
vs.
THE MAYOR & ALDERMEN OF THE CITY of Savannah *et al.*
Petition for Relief and Injunction.

On reading and filing the foregoing petition it is ordered that the defendant The Mayor and Aldermen of the City of Savannah do show cause before me on the ninth day of August proximo, or at such other time as said hearing may be ordered, why temporary injunction should not issue as prayed for until the final hearing of said cause, and in the meantime the said Mayor and Aldermen of the City of Savannah and Robert J. Wade, the marshal of said city, are restrained from advertising or selling any of the said property of said plaintiffs levied on for city taxes until the further order of this court.

July 29th, 1890.

R. FALLIGANT,
Judge E. J. C. of Ga.

STATE OF GEORGIA,
Chatham.

To the sheriff of the superior court of Chatham county, Greeting:

DAVID WELLS ET AL.
vs.
THE MAYOR AND ALDERMEN OF THE CITY of Savannah *et al.*
Petition for Relief and Injunction.

The defendants, The Mayor and Aldermen of the City of Savannah and Robert J. Wade, city marshal of said city of Savannah:

You are hereby required, personally or by your attorney, to be and appear at the next superior court of Chatham Co, on the first day of December next, then and there to answer the plaintiff
18 on the merits of the foregoing petition, as in default of such appearance the said court will proceed as to justice shall appertain.

Witness the Honorable Robert Falligant, judge of said superior court, this 29th day of July, in the year of our Lord one thousand eight hundred and ninety.

J. R. SAUSSY,
Plaintiff's Attorneys.

[SEAL.] J. K. P. CARR,
Cl'k S. C. C. C.

Due and legal service of the within petition acknowledged and copy and process *and copy process* waived.

July 29, 1890.

SAM'L B. ADAMS, *Def'ts' Att'y.*

Filed in office July 29, 1890.

JAS. K. P. CARR,
Clerk S. C. C. C.

The Answer of the Defendants and the Exhibit Thereto.

In Chatham Superior Court.

DAVID WELLS ET AL. *vs.* THE MAYOR AND ALDERMEN OF THE City of Savannah and Robert J. Wade, City Marshal.	Petition for Injunction, &c.

The answer of the defendants to the above-mentioned petition.

These defendants admit that petitioners are holders of certain lots of land in the city of Savannah and said county of Chatham, commonly called ground-rent lots, and sometimes called city lots, but as to how or when they became owners defendants are not informed and ask for information as to these matters. Defendants also admit that these lots were originally granted by this defendant, The Mayor and Aldermen of the City of Savannah, and that pe-
19 titioners are either among the original grantees or are assignees holding under transfers, but they do not know when petitioners became the owners.

These defendants also admit that the said lots of land were originally a part of the common or public domain of the city of Savannah, which was from time to time divided into lots and squares, with street intersections, in conformity to and corresponding with the original plan of said city, and were disposed of by the mayor and aldermen of the city of Savannah and the hamlets thereof, but these defendants deny that the sales of such lots as those held by petitioners were authorized by or were made under the act of the General Assembly approved February 10, 1787, which was "An act for the better regulating the town of Savannah and the hamlets thereof," and the 5th section of which gave the power and authority to the then wardens of the city of Savannah (the predecessors of this defendant, The Mayor and Aldermen of the City of Savannah) to let, lease, or rent at public sale any lot or lots of land, including the lot of land, containing sixteen (16) acres, called the Spring, westward of the said town of Savannah, and the building commonly called the Vendue house, and these defendants claim that because of a defect in this authority the act of the General Assembly approved December 21, 1822, was obtained in order to legalize, confirm, and validate these sales. These defendants deny that the original conveyance of these lots were leases, or that the same were let or rented, but, on the contrary, they contend that the said grants of these lots convey freeholds of inheritance to be defeated upon the non-performance of a condition subsequent, and that the estate acquired by a purchaser from this defendant, The Mayor and Aldermen of the City of Savannah, was an estate in fee-simple, absolute, if he should pay down the whole purchase-money, and conditional if he should not.

20 These defendants further say that the first ordinance passed for the purpose of disposing of the said public common was that passed September 28th, 1790, which was entitled "An act for laying off into lots certain parts of the common appurtenant to the city and for disposing of the same;" which said ordinance (except the title and the reservation of 21 of the lots for certain religious, charitable, and educational purposes) is correctly set forth in sections 1019, 1020, 1021, 1022, 1023, 1024, and 1025 of the last code of the city of Savannah, known as McDonnell's Code; that this ordinance did not contemplate any lease or renting of the said lots, but a sale thereof, and it was expressly provided in the said ordinance that the said bargain and sale shall vest either an absolute or conditional estate in the purchaser, according to circumstances—that is to say, an absolute one if the valuation money shall be paid down, or a conditional one if the said valuation money shall not be paid down; this latter also to become absolute if and when the said valuation money shall at any future time be paid into the treasury and an acknowledgement thereof, under the seal of the city, signed by the mayor and the majority of the aldermen for the time being and attested by the city treasurer, shall be endorsed on such deed. These defendants attach hereto as a part of their answer the form of the deed used under the said ordinance and future ordinances in the case of those purchasers who did not pay in full the valuation or purchase money, but elected to retain the valuation money as a portion thereof, as authorized in the ordinances, and to pay for the same the small interest required by the ordinances. These defendants say that this is the form used in the sales made in Jan. 7, 1791, under the first ordinance, and which has been continuously used ever since until the passage of the ordinance of Jan'y 31st,
21 1872, discontinuing sales which permitted purchasers to elect to hold under this plan and requiring all sales to be made absolutely. These defendants say that all the subsequent ordinances, including the last, passed March 9th, 1854, were modeled after the first ordinance of 1790, except that the ordinance of 27th of June, 1803, concerning certain lots in New Franklin ward, provided that the valuation money shall forever be irredeemable; that the one hundred and twenty lots (except the 21 reserved) referred to in the said first ordinance were sold during the early part of 1791, and the petitioners Charles M. and John M. Gilbert now own the western half of lot number seven (7), Franklin ward, and also number eight (8), Franklin ward; the petitioner Henry Blun now owns the northern half of lot number four (4), Warren ward, and the petitioner Robert McIntire now owns lot number thirty-four (34), Franklin ward, the lots in Franklin, Warren, and Washington ward being sold under the said first ordinance passed September 28th, 1790.

These defendants deny that under the execution and delivery of the said deed, a copy of which is hereto annexed as Exhibit "A," that the relation of landlord and tenant thereby became established between this municipal corporation and the holders of said lots, and deny that the absolute title remained in this corporation, and

that the holders obtained a perpetual lease; but, on the contrary, aver that the title conveyed to purchasers was that hereinbefore mentioned and referred to in the said ordinance to be found in MacDonnell's Code and in the other city codes and in the said deeds, a copy of which is hereto annexed as Exhibit "A," in support of their contention. These defendants say that as to the unpaid purchase-money, the purchasers paid what has been called a ground rent, but what was really only a small interest for the use of the said purchase-money; that by reference to said ordinances it will be found that under those passed September
22 28th, 1790; May 30th, 1799; April 20th, 1801; June 27th, 1803; March 22nd, 1819, and June 19th, 1815, which ordinances covered a large number of those sold on the ground-rent plan, only five per cent. (5%) interest was charged and payable on this balance of purchase-money. Under the ordinance of June 19th, 1815, six per cent. (6%) was chargeable as to the lots in Brown and Jackson wards therein mentioned, and this was the rate of interest under the ordinances of February 3rd, 1837; March 14th, 1839; February 11th, 1841, and the later ordinances. These defendants deny that the construction placed on the tenure by which these lots are held by the petitioners is the uniform, continuous, and express construction placed thereon by this defendant corporation from the first disposition of them by public sale to the present time, and while it is true that in some of the published reports made before and since the ordinance of January 31, 1872, these lots, in the statistical reports, have been put down by officials of the city as lots held under lease and lots not taxable, these defendants say that only the idea of such officials was expressed as to the status of the lots; that they were not passing upon this question in any way, and this only indicates that these lots were not, in point of fact, taxed and no revenue came therefrom, except the ground rent or interest aforesaid. This defendant corporation has always exercised the right of ratifying subdivisions of the said lots in making separate titles when it was desired by the holders of any particular lot to surrender the first title and to obtain separate titles, but these separate titles have always been made under the form always used and hereto annexed as Exhibit "A" and under the ordinances thereto appertaining.

These defendants deny that under the authority of this de-
23 fendant corporation any officer of this defendant corporation ever announced to the bidders at the sale of city lots that those disposed of under what is called the ground-rent plan were not subject to city taxation, although it may be true that upon one or more occasions the city marshal did express the current opinion that these lots would not be taxed by reason of the fact that they had not been in many years; but these defendants cannot find any action of council authorizing any statement of this character or ever agreeing that these lots should not be taxed, and they deny that such action has ever been taken by the council of the city of Savannah in any way.

These defendants say that it is true that upon default of the pay-

ment of the interest or the ground rent the right of re-entry has been made under the terms and provisions of the said ordinances and deeds, but they say that the only right possessed by this defendant corporation has been the right to re-enter for the purpose of making sale, and that after paying itself the balance of the original purchase-money *and* surplus that might have been realized really belonged, under the decision of the supreme court of this State in the Lawrence case, reported in 71 Ga., to the original purchaser or his assigns, and that, as held by that court in the decision referred to, "the right reserved by the city was only a pledge or security for a debt that might be due to it."

These defendants deny that the said lots have always been free from municipal taxation, but, on the contrary, say that prior to the ordinance passed November 24th, 1806, if not thereafter, these lots were subject to municipal taxation; that—the minutes of the meeting of the council of this defendant corporation of September 28th, 1790, at which the first ordinance hereinbefore referred to was adopted, it was proposed that a bill be then prepared for
24 laying an assessment (which at that time was the ordinary taxation) upon the inhabitants of the city, and a bill for this purpose was read for the first time at this meeting. Neither the minutes nor the ordinance books (which are incomplete) show what this tax ordinance was, but the first tax ordinance that the books and records of this defendant corporation show is that passed December 17th, 1793, which was an ordinance in part for "the raising of a sum of money annually to defray the expenses of the city of Savannah," and this ordinance assessed, among other things, for "each one hundred (100) pounds value of houses or lots within the city or hamlets six pence," and contains no exemption of any kind, although at that time a large number of lots were held on what was called the ground-rent plan. These defendants say that this ordinance or a similar one remained in force until November 24th, 1806, at which last-mentioned date an ordinance was passed to amend an ordinance entitled "An ordinance to raise a fund for the support of a watch in the city of Savannah," passed the 7th of April, 1806, and which provided, among other things, that "so much of the first section of the aforesaid ordinance as imposed a tax on lots held by lease from the corporation, and so much thereof as imposed a tax on houses, buildings, lots, and wharves owned by persons residing out of the limits of this State be, and the same is hereby, repealed." If by "lots held by lease" were meant lots like thos- of petitioners, then these defendants say that this ordinance of November 24, 1806, which appertained to the support of a watch, was the first which undertook to exempt these lots. The first tax ordinance which refers to ground-rent lots in terms is that passed October 29, 1857, and for many years the tax ordinances of the city of Savannah have not had any exemption as to leased lots or ground-rent lots or any reference thereto. Defendants say, as the records of the city show, that the city has always had rented out, under lease for
25 definite terms, property belonging to the said city. Defendants believe that for many years prior to the early part of

1878 no effort was made to tax these lots, although for many years a good many people in the city had thought that they were taxable and ought to be taxed. On the 29th day of March, 1878, *at* a meeting of the council of the city of Savannah — called for the special purpose of discussing the question as to the taxation of these lots, at which meeting there were present, by invitation, a number of the most prominent members of the Savannah bar in addition to the then corporation attorney. At the meeting of council held April 3, 1878, a resolution offered by Alderman D. G. Purse (one of the petitioners), which provided for the assessment of these lots at their market value for taxation, was passed by council, this action being in accordance with the advice of these attorneys obtained at the meeting of March 29th, 1878. Afterwards, to wit, May 29, 1878, an ordinance was passed, to be found on page 75 of Rebarer's Digest, taxing these lots. Defendants say that no action on this subject has been taken by council since the last-mentioned date until the meeting of October 30, 1889, when a resolution was passed referring to the corporation attorney for his opinion the list of real estate reported to council by the city treasurer as not assessed for taxes, and more especially the lots commonly designated as ground-rent lots, which represented the bulk of the property not taxed, and this resolution called for the opinion of the corporation attorney as to the character of the tenure under which these lots were held and on the question as to whether they were subject to municipal taxation. These defendants are not prepared to say why the action of council taken in 1878, as hereinbefore set out, was not carried out; but the effort to tax aroused the opposition of the holders of these lots. Litigation was threatened and the matter was not pressed, although
26 the action of council in the premises was never in any way rescinded. At the meeting of council held November 19, 1889 (the opinion of the corporation attorney having been previously filed and being to the effect that these lots were subject to municipal taxation), a resolution was passed by council directing the assessment committee of council to instruct the board of assessors of the city to assess these lots for taxation for the year 1890. Subsequently and prior to the adoption of the tax ordinance for the year 1890 these lots were duly assessed for taxation, and according to the assessment these lots were assessed (exclusive of their improvements) at the sum of one million five hundred and fifty-nine thousand four hundred and seventy-one dollars, and defendants say that these lots held as they are were fairly and justly assessed. The entire assessment of real estate in the city of Savannah outside of these lots is eighteen million five hundred and eighty thousand three hundred and thirty-four dollars.

Defendants say that prior to 1878 there has been from time to time agitation and discussion in the public mind on this ground-rent question, although, so far as they are advised, it never assumed any definite shape of late years until 1878. They believe it to be true that in the reports of officials these lots were sometimes called city lots, and sometimes lots held under lease; but they are advised that this is not the legal view of their status.

These defendants are advised that the provision in the said deeds to the effect that they are "subject only to such assessments and burdens as shall be in common with other lot-holders in the said city" are not to be construed as contended for by petitioners, but, on the contrary, they provide for taxation. Defendants say that when this covenant was first employed there were no assessments or burdens upon the lot-holders of the city of Savannah save only the ordi-
27 nary taxation, and that assessments for sidewalks and street improvement were of a much later day. The holders of these lots have paid assessments for sidewalks and other street improvements as the owners of these lots, and neither in the ordinances nor in any procedure under them for the cost of such improvements has any distinction been made between the holders of these lots and of other lots. Defendants say that the city of Savannah has never paid any assessment or burden on these lots, as owner or otherwise, and the suggestion of such a liability in the petition of petitioners is the first intimation they have had of such a claim. Defendants say that petitioners and the other holders of these lots have always paid State and county taxes thereon as the owners.

These defendants say that the last annual report of the mayor of the city of Savannah for the year ending December 31st, 1889, contains, on pages 52, 53, 54, *et seq.*, a statement of all the ground-rent lots not paying taxes at the time of the report and of the owners thereof; that the lots mentioned on pages 80 and 81 as Springfield lots are not held as are the lots mentioned by petitioners, but were disposed of under an ordinance of the city of Savannah approved January 16, 1851, and which provided for their leasing for twenty-four years, and defendants attach hereto as Exhibit "B" the form of lease used for the said Springfield lots. Defendants deny that this defendant corporation has ever made any agreement with the petitioners or their privies exempting the said lots from municipal taxation or that any consideration has ever been paid for such exemption, and as to all these matters they call for strict proof. They also deny that this defendant corporation is estopped from taxing the same. It is true that executions have been issued and levied upon the lots of the petitioners D. G. Purse, Charles M. and John H. Gilbert, Henry Blun, and Robert McIntire for
28 taxes claimed on these lots for the year 1890, and that it is proposed to compel payment of like taxes from all other lots held as these are unless such taxation is held to be unlawful. The cases of the petitioners mentioned having been pressed as test cases and proceedings against other holders of these lots being held, until the determination of these cases, in abeyance, these defendants are only desirous of doing their duty in the premises and of doing justice to all tax-payers.

These defendants, having fully answered, pray that they may be hence dismissed with their costs and charges, and submit that the injunction prayed for should not be granted.

JOHN SCHWARZ, *Mayor.*
SAM'L B. ADAMS,
City Att'y & Att'y for Def'ts.

[SEAL.]
Attest: C. V. HERNANDEZ,
Acting Clerk of Council.

GEORGIA, }
Chatham County. }

You, John Schwarz, mayor of the city of Savannah, do make oath that the foregoing answer is true to the best of your knowledge, information, and belief.

JOHN SCHWARZ, *Mayor.*

Sworn to and subscribed before me this August 8th, 1850.

C. V. HERNANDEZ,
Notary Public, C. C., Ga.

29 EXHIBIT "A."

STATE OF GEORGIA, }
City of Savannah. }

This indenture, made the — day of —— in the year of our Lord one thousand eight hundred and — and in the — year of the Independance of the United States of America, between the mayor and aldermen of the city of Savannah and the hamlets in the State of Georgia, of the one part, and —— —— of the other part.

Whereas under and by virtue of an ordinance for that purpose made and passed by the mayor and aldermen of the city of Savannah, aforesaid on the — day of —— one thousand eight hundred and — and a certain portion of the — commons was laid out into lots, and the said lots, after being duly valued, were exposed to public sale on the terms and conditions mentioned in the said ordinance:

And whereas, the lot hereinafter mentioned, being valued at — was sat up at that sum, and there was bid thereupon as increase money, — at which sums the said —— —— being the highest bidder, became the purchaser of the said lot: and whereas, the said —— —— having paid into the city treasury the sum of — made — election, for the present, of retaining the valuation money in — own hands, and paying a ground rent for the use and occupation of said lot, which ground rent, at and after the rate mentioned in said ordinance, will amount to — per year:

Now, therefore, this indenture witnesseth, that the said mayor and aldermen, for and in consideration of the said sum of — being paid into the city treasury, as by a receipt for the same, endorsed hereon, and signed by the city treasurer, will appear; and
30 also in consideration of the rent to be paid, and of the several covenants and agreements to be performed, have bargained and sold, and by these presents do bargain and sell, unto the said —— —— all that lot of land situate, lying and being in that portion of ground lately in the — common, now called — ward, known by the number and containing sixty feet in length, and — feet in depth, with the rights, members and appurtenances thereof:

To have and to hold the said lot, with all and singular the advantages thereunto belonging, unto the said —— —— executors, administrators and assigns, forever, on this express condition. Nevertheless, that — the said —— —— executors, administrators and

assigns, do and shall yearly and every year during such time as the said valuation money shall remain unpaid, by four equal and quarter-yearly payments, pay or cause to be paid into the city treasury of Savannah aforesaid, the sum of — as ground rent, for the use and occupation of the said lot and premises the first quarterly payment to be made on the — day of —— next ensuing; and in case of failure herein for the space of twenty days after any of the said quarterly payments shall become due, that then the said lot and premises shall revert to the corporation of the said city, who shall immediately thereafter possess the power of re-entry; and having, by means of their proper officers, exercised such power, and given a notice thereof in writing, posted on the premises, the said lot, with all improvements thereon, shall be considered at the expiration of ten days thereafter, as absolutely revested in the corporation, and the estate by these presents created, determined to all intents and purposes as fully as if the same had not been bargained for or purchased; any sale or incumbrance, or other act
31 made or suffered by the said —— —— executors, administrators or assigns, or others under — or them, to the contrary thereof in anywise notwithstanding.

And the said —— —— for — heirs, executors and administrators, and every of them hereby covenant, grant and agree to and with the said mayor and aldermen, and their successors in office for the time being, that the said annual ground rent shall be well and truly paid into the city treasury, by quarterly payments as aforesaid, according to the true intent and meaning of the said ordinance, and of these presents; and that, in case of failure therein, it shall and may be lawful for such re-entry to be made, and for all such other proceedings to be used as in and by the said ordinance, and the condition aforesaid are pointed out and directed; the said —— —— in that case, for — heirs, executors, and administrators, and assigns and every of them, hereby renouncing and releasing all claims whatsoever, both in law and equity, to the said lot with the improvements then thereon being. And it is hereby declared to be the true intent and meaning of these presents, and all parties to the same, that, on payment of the said ground rent, at the times and after the manner hereinbefore directed, the said —— —— heirs, executors, administrators, and assigns, shall and may from time to time, and at all times, hereafter, peaceably and quietly have hold use, occupy, possess and enjoy the said lot and premises, and receive and take the rents, issues and profits thereof, and of every part thereof, to — and — own use, absolutely, without the let, suit, trouble, eviction, or denial of the said corporation or of any person whatsoever acting under them or by virtue of their authority,
32 subject only to such assessments and burthens as shall be in common with other lot-holders in the said city.

And lastly, it is hereby provided and agreed, that it shall, at any future time, be in the power of the said —— —— heirs, executors, administrators, or assigns, if — or they shall so incline, to pay in the said valuation money to the city treasury, with what rent may be due up to that time, in full discharge and extinguishment of the

ground rent; and in that case there shall be an acknowledgment of such payment under the seal of the city signed by the mayor and a majority of the aldermen for the time being, and attested by the city clerk, endorsed on these presents, which shall then and from thenceforth vest an absolute estate, in fee-simple, of and in the said lot and premises, in the said —— —— heirs and assigns to — and their only proper use and behoof forever.

In witness whereof, the parties aforesaid, their hands have hereunto interchangeable set, and have also put these presents under seal in manner directed by the ordinance, the day and year first above written.

—— ——.
—— ——.

Signed, sealed, and delivered in presence of—
—— ——.
—— ——.

CITY TREASURER'S OFFICE,
SAVANNAH, —— —, 186–.

Received from —— —— — dollars, being — per centum on the — purchase-money of the foregoing-named lot.

—— ——,
City Treasurer.

$—.

33 EXHIBIT "B."

STATE OF GEORGIA,
City of Savannah.

This indenture, made this — day of —— in the year of our Lord one thousand eight hundred and — and in the — year of the Independence of the United States of America, between the mayor and aldermen of the city of Savannah and the hamlets thereof, in the State of Georgia, of the one part, and —— —— of the other part:

Whereas, pursuant to and under the provisions of an ordinance of the said mayor and aldermen of the city of Savannah and the hamlets thereof, in council assembled, passed on the — day of —— in the year of our Lord one thousand eight hundred and — entitled "An ordinance for laying off into lots certain parts of the tract of land known as the Springfield plantation, purchased by virtue of an ordinance passed June 10th, 1850, and for disposing of the same," certain of the lots laid off pursuant to said ordinance, after being duly valued, were exposed to public sale, on the terms and conditions mentioned and contained in the said ordinance—and whereas, the lot hereinafter mentioned, being valued at the sum of —, was set up at that sum, and there was bid thereupon as increase money the sum of —, at which sum the said —— —— being the highest bidder, became the purchaser of said lot:

And whereas, the said —— —— having paid into the city treasury the sum of —, being — per centum upon the aggregate of such valuation and increase money, and hath made — election to retain the balance of said purchase-money in — own hands, and pay to the

said the mayor and aldermen of the city of Savannah and the hamlets thereof, interest at the rate of seven per centum per annum by way of ground rent for the use and occupation of said lot for
34 the space of twenty-four years, which interest by way of ground rent at and after the rate mentioned in said ordinance will amount to — annually, with the right and privilege reserved to the said heirs, executors, administrators or assigns at any time within the said twenty-four years, of paying up the said balance of purchase-money, and all interest by way of ground rent as aforesaid, due and to be due, and receiving from the said mayor and aldermen of the city of Savannah and the hamlets thereof, a deed of conveyance in fee-simple of and to said lot of land, with the premises and appurtenances, subject to all reservations and restrictions mentioned and contained in said ordinance:

Now, therefore, this indenture witnesseth, that the said the mayor and aldermen, for and in consideration of the premises, and of the said sum of — being paid into the city treasury, as by a receipt for the same, hereto attached, and signed by the city treasurer, will appear, and of the interest to be paid by way of ground rent as aforesaid, and of the several covenants and agreements to be performed, have demised, let and to farm let, and, by these presents, do demise, let, and to farm let unto the said —— —— heirs, executors, administrators and assigns, all that lot of land situate, lying and being in that portion of ground known lately as the Springfield plantation, as aforesaid, known as the number — with the rights, members and appurtenances thereof, for and during the full end and term of twenty-four years, beginning and to be reckoned from the — day of —— in the year of our Lord eighteen hundred and —.

To have and to hold the said lot, except the reservation — as aforesaid, with all and singular the advantages aforesaid, unto
35 the said —— ——, executors, administrators and assigns, for and during the full end and term of twenty-four years, to be reckoned as aforesaid, upon the following conditions, stipulations and covenants, that is to say: upon condition that the said —— ——, heirs, executors, administrators and assigns, do and shall yearly and every year during such time as the said balance of purchase-money, or any part thereof, shall remain unpaid, by four quarterly payments, pay or cause to be paid into the city treasury of Savannah aforesaid, interest by way of ground rent, at the rate of seven per centum per annum for the use and occupation of the said lot and premises—the first quarterly payment to be made on the — day of —— next ensuing; and in case of failure herein for the space of twenty days after any of the said quarterly payments shall become due, or of failure to pay the balance of principal or purchase-money at the end of said term of twenty-four years, that then the said lot and premises shall revert to the corporation of the said city, who shall immediately thereafter possess the power of re-entry; and having by means of their proper officers, attorneys or agents, exercised such power, and given a notice thereof in writing posted on the premises, the said lot, with all improvements thereon, shall be considered, at the expiration of ten days thereafter, as absolutely

revested in the said corporation, and the estate or lease by these presents vested, determined to all intents and purposes as fully as if the same had not been bargained for, leased or demised, any sale or incumbrance or other act made or suffered by the said —— ——, heirs, executors, administrators or assigns, or others under him or them to the contrary in anywise notwithstanding. And the said —— —— do- for —, heirs, executors, administrators and assigns, and every of them, hereby covenant, grant and agree, to
36 and with the mayor and aldermen for the time being, and their successors in office, that said annual interest by way of ground rent shall be well and truly paid into the city treasury by quarterly payments as aforesaid according to the true intent and meaning of the said ordinance, and of these presents; and that in case of failure therein, or of failure to pay the balance of purchase-money at the end of said term of twenty-four years, as aforesaid, it shall and may be lawful for such re-entry to be made, and for all such other proceedings to be used, as in and by said ordinance, and the ordinance passed on the twentieth day of April, in the year eighteen hundred and one, so far as the same is applicable, therein referred to, and the condition aforesaid are pointed out and directed; the said —— ——, heirs, executors, administrators and assigns, and every one of them, hereby renouncing and releasing all claim whatsoever, both in law and equity, to the said lot and term and lease aforesaid, with the improvements then on said lot being.

And it is hereby declared to be the true intent and meaning of these presents, and of all parties to the same, that, on payment of the said interest by way of ground rent, at the time and after the manner hereinbefore directed the said —— ——, heirs, executors, administrators and assigns, shall and may, from time to time, and at all times, during the continuance of this lease, peaceably and quietly have, hold, use, occupy, possess and enjoy the said lot and premises, and receive and take the rents, issues and profits thereof to — and — own use, without the let, suit, trouble, eviction or denial of the said corporation, or of any person or persons whatsoever acting under them, or by virtue of their authority.

And it is hereby provided and agreed that it shall, at any
37 future time, within the said twenty-four years, be in the power of and optional with the said —— —— heirs, executors, administrators or assigns, if — or they shall be so inclined, to pay any part of the balance of said purchase-money, with what interest by way of ground rent may be due up to that time, into the city treasury, and stop the said interest by way of ground rent, on said amount so paid in; and also that it shall, at any future time within the said twenty-four years, be in the power of the said —— —— heirs, executors, administrators or assigns, if — or they shall be so inclined, to pay in the entire balance of such purchase-money to the city treasurer, with what interest by way of ground rent may be due up to that time, in full discharge and extinguishment of such balance of purchase-money and interest by way of ground rent; and in the latter case there shall be an acknowledgment of such payment under the seal of the city, signed by the

mayor and a majority of the aldermen for the time being, and attested by the city clerk, endorsed on these presents, which shall then and thenceforth vest an absolute estate, in fee simple, of and to the said lot and premises in the said —— —— heirs and assigns, to — and their only proper use and behoof forever.

In witness whereof, the parties aforesaid, their hands have hereunto interchangeable set, and have also put these presents under seal, the day and year first above written.

—— ——.
—— ——.

Signed, sealed, and delivered in the presence of—
—— ——.
—— ——.

CITY TREASURER'S OFFICE,
SAVANNAH, —— —, 185-.

38 Received from —— —— — dollars, being — per centum on the purchase-money of the foregoing-named lot.

—— ——,
$—. *City Treasurer.*

Filed in office Aug. 9, 1890.

JAMES K. P. CARR,
Cl'k S. C. C. C.

Judgment of the Court Granting the Nonsuit and Dismissing said Cause.

In Chatham Superior Court.

DAVID WELLS ET AL.
vs.
MAYOR AND ALDERMEN OF THE CITY OF Savannah *et al.* } Injunction and Relief.

In the above-stated cause, upon the completion of the evidence submitted by plaintiffs, the defendants made a motion to dismiss the case in the nature of a motion for a nonsuit.

Whereupon it is considered and ordered that the said motion be, and the same is hereby, sustained, and that the said case be, and the same is hereby, dismissed at the costs of plaintiffs.

R. FALLIGANT, *Judge.*

In open court, this 27th day of April, 1898.

Filed in office Ap'l 27, 1898.

JAMES K. P. CARR,
Clerk S. C. C. C.

39 GEORGIA, }
Chatham County. }

CLERK'S OFFICE, SUPERIOR COURT.

I, James K. P. Carr, clerk of said court, do hereby certify the above and foregoing 37 pages in typewriting to be a true and com-

plete copy of such parts of the record as are specified in the bill of exceptions necessary to be transmitted to the supreme court of Georgia in the case of David Wells *et al. versus* The Mayor and Aldermen of the City of Savannah, which case was heard and determined upon a motion to dimiss at the March term, 1898, of Chatham superior court—that is to say, on the 27th day of April, 1898.

In testimony whereof I have hereunto set my official signature and affixed the seal of said court this 29th day of April, 1898.

JAMES K. P. CARR,
Clerk S. C. C. C. Ga.

[SEAL.]

Filed in office July 1, 1898.

LOGAN BLECKLEY,
D. C. S. C. Ga.

40 CLERK'S OFFICE, SUPREME COURT OF GEORGIA,
ATLANTA, *March* 5, 1900.

I hereby certify that the foregoing pages hereto attached contain a true copy of the transcript of record in the case therein stated, as appears from said transcript now on file in this office.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON,
Clerk of the Supreme Court of Georgia.

41 No. 7, Eastern.

In the Supreme Court of Georgia, October Term, 1898.

DAVID WELLS ET AL., Plaintiffs in Error,
versus
THE MAYOR AND ALDERMEN OF THE City of Savannah *et al.*, Defendants in Error.
} Equity. From Chatham Superior Court.

Original.

Bill of Exceptions.

Saussy & Saussy, attorneys for plaintiffs in error. P. O. address, Savannah, Ga.

Filed in office June 9th, 1898.

JAMES K. P. CARR,
Clerk S. C. C. C.

Filed in office June 15, 1898.

LOGAN BLECKLEY,
D. C., S. C. Ga.

Due and legal service of the within bill of exceptions acknowledged and copies received.
Savannah, June 8, 1898.

SAM'L B. ADAMS,
(*Savannah, Ga.,*) *Att'y for Def'ts in Error.*

42 STATE OF GEORGIA, }
Chatham County. }

Be it remembered that on the 27th day of April A. D. 1898, during the March term, 1898, of the superior court of Chatham county, there came on to be heard before the judge of said court, and a jury regularly empanelled and sworn, a cause in which David Wells, Thomas Ballantyne, Charles M. Gilbert and John H. Gilbert, William Kehoe, Harry Blun, Daniel G. Purse, Robert McIntyre, Mary E. Douglass and Dennis O'Connell were plaintiffs, against The Mayor and Aldermen of the City of Savannah, a municipal corporation of said State, and Robert J. Wade, city marshal, the said cause being a petition in equity for injunction and relief.

The said cause was heard upon the petition and exhibits and amendments thereto of the plaintiffs, the answer and exhibits of the defendants and upon the evidence submitted, a brief of the said written and oral evidence, as is material to a clear understanding of the errors complained of is herein incorporated and set forth as follows:

The minutes of council of the city of May 18, 1790, showing that the yearly expenses of the city government were estimated to be twelve hundred and fifty pounds, towards defraying which the committee find that the funds of the city will produce the sum of £542.

There being a deficiency of £708, as appears from the above statement of expenditures, and ways and means for defraying the same, your committee, fully impressed with the necessity of carrying into effect the (aforesaid) improvements as early as possible, and with a view of relieving the inhabitants from burthensome assessments, as they find the common- appurtenant to the city are invested in the lot-holders by law, recommend that the said lot-holders meet at the court-house on Monday next at 9 o'clock in the morning to determine on the expediency of laying off and disposing of part of said commons for defraying the necessary expenses of the current year, as well as establishing a fund for that purpose in the future.

Resolved, That it is the sense of this council that the said lot-holders be informed at their meeting that the mayor and aldermen wish to be empowered to lay off all that part of the common on the east and west sides of the city which lies toward the bay, drawing a line from the west of the trustees' gardens directly along
43 the north line of Broughton street to the east of Yamacraw, and to lay out lots on the ground so taken in on the east and west sides of the city agreeably to the old plan of Savannah as nearly as the same can be conveniently done. That a draft or plan be made to recommend to the lot-holders to empower them to dispose of, with an instrument in writing, to be signed by as many as

approve of the measure to be laid before the meeting on Monday next.

There not being a sufficient number present to proceed to business, the members present only laid before the meeting of lot-holders convened together pursuant to the notification, the report of their committee on ways and means, and then adjourned.

Min. June 1.

Resolved, That the marshal immediately summon all the lot-holders of the city and its hamlets to a meeting at the court-house at 5 o'clock this afternoon on the business postponed from yesterday.

The minutes of council of July 6, 1790, — contains a petition and remonstrance from a number of persons, in all seventy, praying that a further convention of lot-holders in this city may be called on the subject of laying out a part of the common, was presented to council and read, and there being also before council another prayer signed by a greater number of lot-holders, to wit: in all ninety-two, expressing their full approbation of the measure of laying out said common:

Resolved, That council will, on Tuesday next, consider the merits of the said two papers, respectively, in order that they may determine by which they will be governed, and appointed a committee to examine the names annexed to each of the said two papers and report any of the names not entitled to a voice in this case, if any such there be.

The committee appointed to bring in a bill for laying off part of the east and west common, reported a draft of such bill, which was read the first time.

The minutes of July 13, 1790, contains a report of the committee appointed to examine the names annexed to the two papers above referred to, which shows that on one petition four were not entitled to a voice, and on the petition calling for another convention ten were not entitled to a voice. It was ordered that a report of the committee be furnished the first subscribers in each petition.

Council then proceeded to the order of the day for determining by which of said two petitions they will be guided, and the merits of each being fully discussed and considered, do resolve,

44 1st. That from the return of the lots in the city and hamlets made to the tax collector for the last year, it appears that there are about 200 persons entitled to vote in the present instance, and that as a number of those present live out of the city, and some of them even out of the State, it cannot reasonably be expected that the whole number will appear pro and con to any measure whatever.

2d. That the two lists added together amount to 154 good votes, besides six members of council, which are a respectable number out of 200.

3d. That out of the above number of lot-holders there are ninety-four for absolutely laying out a part of the commons into lots, and sixty-six subscribers to the other paper, and these latter do not pos

itively say that they are against the measure, but only desire that another meeting should be called for deliberation thereon.

4th. That under such circumstances the council think they are well warranted, and therefore determine to be guided by the paper in favor of laying out the said lots, and will accordingly proceed in said business.

The minutes of September 28, 1790, in which it was stated that "the bill for laying out and surveying part of the commons into lots was read a third time, and that it was resolved that the same be passed into an ordinance under the title of an ordinance for laying off into lots certain parts of the commons appurtenant to the city, and for disposing of the same, and that the mayor do sign the same."

Ordinance of September 28th, 1790.

An ordinance for laying off into lots certain parts of the common appurtenant to the city, and for disposing of the same.

Whereas, public utility requires that certain parts of the common be laid out and disposed of:

SECTION 1. Be it ordained by the mayor and aldermen of the city of Savannah and the hamlets thereof, in council assembled, and it is hereby ordained by the authority of the same, That all that part of the east and all that part of the west common, situate, and lying between Bay and Broughton streets, extending eastwardly to a public — of one hundred feet in width, and westwardly to a public street of the same width, be, on or before the first day of November next, ensuing, laid off into one hundred and twenty lots; that is to say, eighty lots on the east and forty lots on the west common, each lot to contain sixty feet in width and ninety feet in depth, with certain squares, streets and lanes, in and between the same, agreeably to the plan marked No. 1 (one), hereunto annexed, and being so laid off, the said lots, or as many of them as can be, shall be sold and disposed of on the terms and conditions hereinafter mentioned; that is to say, the said lots shall be valued according to the estimate or schedule marked No. 2 (two), hereunto annexed from one hundred and sixty pounds to forty pounds lawful sterling money, inclusive, and the ground rent of the same shall be in proportion, and after the rate of five pounds per annum on every hundred pounds value, and it shall be in the option of the purchaser either to pay down the said valuation money, or else hold his or her purchase on ground rent, payable quarterly, as hereinafter mentioned.

SEC. 2. And be it further ordained, That said lots shall be put up at public auction in arithmetical progression, beginning at number one (1), in each ward, and so proceeding upwards until they shall be all disposed of (except as hereinafter excepted, or until so many of them shall be disposed of as there appear bidders for; and the said lots shall be respectively set up at the valuation contained in the said schedule annexed), and whatever sum or sums shall be bid upon the said valuation at the same time of the sale of the said

lots shall be considered as increase money and shall be paid down in cash, and the person bidding most of such increase money shall be deemed the purchaser of the lot then under sale; and in regard to the said valuation money, it shall be in the option of the purchasers either to pay the same down in cash, or else to retain the same in their hands and the hands of their heirs and assigns forever, on a ground rent, which ground rent shall be at and after the rate of five pounds, by the year, for every hundred pounds value of the purchase, and so in proportion for any greater or lesser sums, payable in four equal quarterly payments into the city treasury; but it shall, nevertheless, at any time hereafter, be in the power of such purchasers, or their heirs and assigns, to pay in the said valuation money, with what rent may be due up to that time, in full discharge and extinguishment of the said ground rent.

SEC. 3. And be it further ordained, That a deed, by way of bargain and sale, shall be made to all and every purchaser or purchasers of the said lots, under the seal of the city, signed by the mayor and a majority of the aldermen for the time being, and attested by the clerk, who shall enter a docket or abstract of such conveyance in a book to be provided and kept for that purpose, and a note or memorandum of such docket or abstract, shall be marked on the said deed. And the said bargain and sale shall vest either
46 an absolute or conditional estate in the purchaser according to circumstances, that is to say, an absolute one, if the valuation money shall be paid down, or a conditional one, if the said valuation money shall not be paid down, this latter also to become absolute if and when the said valuation money shall at any future time be paid into the treasury, and an acknowledgment thereof under the seal of the city, signed by the mayor and a majority of the aldermen for the time being, and attested by the city treasurer, shall be endorsed on such deed. And the said conditional estates shall amount to this, that the use and occupation of the premises are forever secured to the purchaser and others claiming under him or her on payment of the ground rent, but on failure therein for the space of fifteen days after the same shall become due, the said premises are to revert to the corporation, who shall immediately thereafter possess the power of re-entry, and having by means of their proper officers exercised such power and given a notice thereof in writing posted on the premises, the lot or lots so entered upon with all improvements thereon, are to be considered at the expiration of ten days thereafter as absolutely revested in the corporation, and the conditional estate therein determined, to all intents and purposes as fully as if the same had not been bargained for, or purchased, any sale or incumbrance or other act, made of suffered by the purchaser or purchasers or others under him, her or them to the contrary thereof, in anywise notwithstanding.

Sec. 4 provided for the giving of a bond of those taking conditional estates at the time of receiving the deed of bargain and sale to the mayor and aldermen of the city of Savannah with good security in the penal sum of four times the annual ground rent of the

purchase conditioned for the payment of such rent quarterly during the continuance of said conditional estate without fraud or further delay; and also that in case of re-entry made by the corporation or its officers such purchaser shall and will forfeit and pay on the determination of said conditional estate at the rate of ten per cent. on the valuation money of his purchase, if there shall be no building erected thereon to the value of at least twenty pounds sterling; but if there shall be any such building erected thereon to that value, then the same shall excuse the party from said forfeiture of ten per cent. And in all cases the building shall be appraised and valued by two or three citizens appointed by and sworn before the city council.

47 Sec. 5 provides for the resale of re-entered lots within five years from the first sale to be sold out again on the same terms and conditions as the said lots are now directed to be sold and let out upon a reasonable addition being made to the respective valuation for any buildings or improvements that may be made on the said lots, respectively.

Sec. 6 provides for donation of certain lots for church and charitable purposes.

Sec. 7 provides for giving three months' notice of intended original sale, and provides for commissioners to conduct the same.

Sec. 8 provides for having the lots surveyed by the county surveyor or other surveyor under the direction of the commissioners.

Notice of Sale of Lots.

(Georgia Gazette, June 13, 1799.)

The subscribers appointed commissioners to superintend the sale of the lots laid out on the east and west common, in pursuance of an ordinance of the city council, hereby give notice that the sale will commence precisely at 10 o'clock on Monday, June 17th inst., at the court-house, beginning with the lots on the west end of the city, in numerical order, (except those reserved).

The terms specified by ordinance are as follows: The lots will be set up at the valuation fixed by council, and whatever sum is bid above such valuation will be required in cash, and the person being the highest bidder shall be deemed the purchaser; purchasers are at liberty to take a lease to him or her or his or her heirs and assigns forever of the lots so purchased at a ground rent of five per cent. on the valuation, payable quarterly to the city treasurer, or to extinguish the leasehold title by paying at any time to the city treasurer the original valuation money and all arrears of rent of the lot and take a title in fee-simple to the premises. On failure to pay the ground rent quarterly, the city to have a right to re-enter on twenty days' notice to the person in possession, and in case of non-payment then the lot and improvements to revert to the corporation.

Purchasers taking a leasehold estate will be required to give security approved by council in four times the annual ground rent of the purchase for the due payment of the ground rent quarterly, and in case of re-entry such purchaser to forfeit ten per cent. on the

valuation money unless there are buildings erected on the lot to the value of one hundred dollars, at least, which will excuse the forfeiture.

Other particulars will be declared at the day of sale. By
48 applying to the city clerk the valuation of each lot may be known and the plan seen.

JOSEPH CLAY,
THOS. YOUNG,
W. STEPHENS,
JOHN P. WARD,
GEO. JONES,
Commissioners.

An act to confirm certain conveyance of the town common of Savannah made by the mayor and aldermen.

The mayor and aldermen of the city of Savannah having been prohibited, by an act passed on the first of December, 1760, from alienating or granting away for any purpose whatsoever, than by an act of the General Assembly, the common appertaining to said town, and it being represented to the legislature that the said mayor and aldermen to the great advantage of the lot-holders, and with much profit to the treasury of said city have at different times heretofore alienated, granted and conveyed certain parts or lots of said common, and justice requiring that the agreements made by the corporation with the purchasers be confirmed:

Be it enacted, etc., That all and singular the conveyances heretofore made of the said town common under the authority of the mayor and aldermen, whether in fee-simple or otherwise, shall be and they are hereby declared to be legalized, confirmed and made valid to all intents and purposes, according to the covenant, limitations and agreements of the same.

Assented to December 21, 1823.

An act to amend and consolidate the several acts which have been passed in relation to the powers and privileges of the corporation of the city of Savannah, etc.

Sec. 8. Be it further enacted, etc., That the said mayor and aldermen, or a majority of them, shall have power to purchase any real or personal estate for the use and benefit of the corporation, and sell and dispose of all or any part of the property, domain, land or lots, or any personal property to the said corporation belonging or appertaining, by lease, for years or fee-simple, as to the said mayor and aldermen, or a majority of them shall — meet and proper.

Assented to December 24, 1825.

Minutes of March 28th, 1850.

It is admitted that all subsequent ordinances for the sale
49 of lots laid out from the South common conform to this ordinance, the ground rent being increased in some ordi-

nances to six per cent. and in others to seven per cent. of the valuation, and the giving of a bond for the payment of the ground rent was dispensed with, and with the further exception that certain lots in Franklin ward were disposed of at certain ground rent, which were irredeemable.

Resolution to buy the whole of the Springfield Plantation tract of land, nine hundred and sixty (960) acres, at $29 an acre, adopted; p. 28.

The ordinance laying off into lots Springfield plantation, and providing for the sale of same, as contained in Henry's Ordinances of Savannah, page- 123, 124, and 125.

Section 1 provides for the laying off of the lots.

Sec. 2 provides that all lots so laid off shall be set up for sale at public outcry by the marshal of the city at the valuation named by the committee appointed by council on the 5th day of December, 1850, under the superintendence of the committee on public sales and city lots, and whatever amount shall, at the sale, be bid on the valuation of a lot, 20 per cent. upon the aggregate of said increase, and the valuation shall be paid into the city treasury in cash, and the highest bidder shall be the purchaser of the lot then sold. In regard to the residue of said valuation and increase money, it shall be optional with the purchaser to pay the same in cash, or else to retain the same or any portion thereof unpaid in his hands twenty-four years from the day of sale, receiving in the latter case, a deed from the mayor and aldermen of the city of Savannah and hamlets thereof, signed and sealed by the purchaser also on condition of the quarterly payment of an annual interest to this corporation, equal to the interest on the amount of said residue, at the rate of seven per cent., and on such further conditions and limitations as are herein set forth and referred to, and with such covenants as are necessary to secure the purchase-money and interest to be expressed in the deed; but it shall nevertheless, at any time hereafter be in the power of the purchaser, his heirs, executors, administrators and assigns to pay to the city treasury the said residue and interest.

Sec. 3 provides for reservation of a ditch ten feet in width to answer as a common drain for all of said lots.

Sec. 4 provides that the third section of the ordinance passed on April 20, 1801, entitled An ordinance for laying off into lots
50 a ward on the southwest of the common appurtenant to the city, and disposing of the same, and more effectually to ascertain the description of the lots in Oglethorpe ward, shall be of force as part and parcel of this ordinance, and apply in the same manner as therein contained to the lots herein directed to be laid off and disposed of, so far as the same is not repugnant to anything herein contained, and so far as same can be made to apply to the location of these lots beyond the limits of the city, and the time of payment fixed upon.

Sec. 5 provides that the sales of a portion of the lots already made at public outcry on January 9, 1851, are confirmed and made

valid and that deeds be executed for said lots upon the terms and conditions herein expressed.

Section 3 of the ordinance of April 20, 1801, above referred to is in words following, to wit:

"SEC. 3. That a deed by way of bargain and sale shall be made to all and every purchaser or purchasers of said lots under the seal of the city, signed by the mayor and a majority of the aldermen for the time being, and attested by the clerk, who shall enter a docket or abstract of such conveyance in a book to be provided and kept for that purpose, and a note or memorandum of such docket shall be marked on said deed, and said bargain and sale shall vest either an absolute or conditional estate in the purchaser according with circumstances; that is to say, an absolute one if the valuation and increase money shall be paid down, or an conditional one, if the valuation and increase money shall not be paid down, the latter also to become absolute, if, and when the said valuation and increase money shall at any future time be paid into the treasury, and an acknowledgement thereof, under the seal of the city, signed by the mayor and a majority of the aldermen for the time being, and attested by the city treasurer, shall be endorsed on such deed; and the said conditional estate shall amount to this: that the use and occupation of the premises are forever secured to the purchaser, and others claiming under him or them on the payment of the ground rent, but on the failure herein for the space of twenty days after the same shall have become due, the said premises are to revert to the corporation, who shall immediately thereafter possess the power of re-entry, and having, by means of their proper officer exercised such power, and given a notice thereof in writing posted on the premises, the lot or lots so entered upon, with all improvements thereon, are
to be considered at the expiration of ten days thereafter, as
51 absolutely revested in the corporation, and the said conditional estate therein determined to all intents and purposes, as fully as if the same had not been bargained for or purchased, any sale or incumbrance, or other act made or suffered by the purchaser or purchasers or others under him or them to the contrary thereof in anywise notwithstanding."

It is admitted that the copy deeds exhibited to the answer are the forms of the deeds executed by the corporation to the purchasers of lots laid out from the town common and Springfield plantation respectively, who elected to hold the lots on a ground rent.

A committee of three aldermen and three citizens were appointed to appraise the lots on the Augusta road, part of the Springfield plantation: Screven, Purse and Saussy; Stone, Roberts and La Roche.

Committee reported appraisement as follows:

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 14, 16 and 18, $500; 11 and 13, $400; 15 and 17, $600; 12, $350.

Resolved, That lots on Augusta road which have been appraised, be offered for sale under the superintendence of the committee on

public sales and city lots on the same terms that the city lots are usually sold.

Ordinance of February 27th, 1851. Henry's Ordinances, p. 126.

An ordinance to authorize any person to make a half lot fee-simple, and also to permit joint lessees of a lot to divide the same into two parts, and to receive titles for the same.

SECTION 1. Be it ordained, etc., That any person holding a lot in the city of Savannah as joint tenant, or tenant in common with another under the ordinary city deed, may pay one-half of the balance of purchase-money due on the same, and upon such payment shall receive a deed in fee for one-half of said lot, which shall be designated as the eastern, western, northern, or southern half, as the case may be.

SEC. 2. That any lessee of a city lot may, on application to council, divide said lot into two parts and receive separate leases for the same, and in all cases referred to in this ordinance the parties shall severally pay for the deeds issued.

Ordinance of July 31, 1851. Henry's Ordinances, 129 *et seq.*, providing for increasing the depth of lots on Gaston street.

Whereas, the purchasers of lots heretofore sold on Gaston street, have applied to council to add twenty feet to the front of
52 each of said lots, making the depth of the same one hundred and twenty feet, upon condition that twenty per cent. be added to the appraised value of each of the said lots, upon which additional value of each lot-holder shall pay at the rate of six per cent. per annum in quarterly payments. Therefore,

SECTION 1. Be it ordained, etc., That from and after the passage of this ordinance, the width of Gaston street be reduced to seventy-five feet, and the depth of the lots fronting south on Gaston street be increased to one hundred and twenty feet.

SEC. 2. That the depth of the lots heretofore sold on Gaston street, extending from Drayton street to Tattnall street, be added twenty feet in front and conveyance be made to each lot-holder upon condition that said lot-holder pay at the rate of six per cent. per annum in quarterly payments on a sum equal to twenty per cent. of the appraised value of such lot, said quarterly payment to be due and payable at the same time that the regular ground rents on said lots fall due.

SEC. 3. That an endorsement on the conveyance heretofore made of any of said lots, signed by the mayor or acting mayor, shall be a sufficient conveyance to said additional twenty feet of each lot if in substance as follows: Whereas, under and by virtue of an ordinance passed July 31, 1851, upon the application of lot-holders on Gaston street, twenty feet was added to the front of each of said lots, between Drayton and Tattnall streets, upon condition that twenty per cent. be added to the appraised value of each of said lots, and each lot holder pay at the rate of six per cent. per annum, in

quarter-yearly payments on said additional value of twenty per cent., said quarter-yearly payments to be due and payable at the same time that the regular ground rents on said lots fall due. Now, know all men by these presents, that the mayor and aldermen of the city of Savannah and the hamlets thereof, for and in consideration of the premises and of the quarter-yearly payment to be made by the within named —— ——, owner of lot No. —, on Gaston street, have bargained and sold and by these presents do bargain and sell unto the said —— ——, heirs and assigns, that lot of land sixty feet in front and twenty feet in depth, immediately in front of said lot No. —, on Gaston street, to have and to hold said addition of twenty feet by sixty feet unto the said —— ——, heirs, administrators and assigns forever, as part of the original lot, upon the express condition, nevertheless, that the said —— ——, heirs, executors, administrators and assigns, shall every year, by four equal
53 quarter-yearly payments, pay or cause to be paid into the city treasury of Savannah the additional sum of as — ground rent for the use and occupation of the same, at the same time and on the same terms as in the original lease of the original lot; and in case of failure to pay the whole ground rent on said lot so added to for the space of twenty days after it is due, then said lot shall revert to the corporation, who shall proceed to re-enter in the manner pointed out in the conveyance of said lot No. —.

In witness whereof, etc.

Deed for Subdivision of a City Lot under Ordinance of February 27, 1851.

No. —.

STATE OF GEORGIA,
City of Savannah.

This indenture, made this first day of March, in the year of our Lord one thousand eight hundred and sixty between the mayor and alderman of the city of Savannah and hamlets thereof of the one part, and Moses J. Solomon of the other part. Whereas, under and by virtue of an ordinance for that purpose made and passed in the city council of Savannah on the 13th day of March, one thousand eight hundred and fifty-one, a certain portion of the South common was laid out into lots, and the said lots after being duly valued, were exposed to sale on the terms and conditions mentioned and contained in said ordinance. And whereas, lot No. 15, Chatham ward, being one of the lots thus valued, was sold on the 23rd day of April, one thousand eight hundred and fifty, unto Joseph Felt; and, whereas, on the twenty-seventh day of February, eighteen hundred and fifty-one, an ordinance was passed setting forth that any lessee of a city lot may, on application to council, divide said lot into two parts and have separate leases for the same; and, Whereas, on the 16th day of February, eighteen hundred and sixty, the mayor and aldermen of the city of Savannah and hamlets thereof, granted the application of Joseph M. Solomons praying

council to grant a separate lease for the eastern half of said lot to Moses J. Solomons, and also praying a separate lease for the western half of said lot No. 15, Chatham ward, unto A. A. Solomons, trustee for Mrs. Z. M. Solomons.

Now, this indenture witnesseth, that the mayor and aldermen for and in consideration of the premises, and in consideration of the rent to be paid, and of the several covenants and agreements to be
54 performed and for the further considerations of the sum of five dollars, well and truly paid, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do bargain and sell unto Moses J. Solomons the eastern half or moiety of said lot, with the rights, members and appurtenances thereof; to have and hold the same unto the said Moses J. Solomons forever upon the terms, covenants and conditions mentioned and expressed in the original lease of said lot unto Joseph Felt, and of record in clerk of council's office, in Record of Titles, vol. 1, p. 218, except that the annual ground rent shall be nineteen and two-hundredth-dollars; the first quarterly payment to be on the 23d day of April, 1860, which said lease unto Joseph Felt is to be taken, held and considered as part and parcel of this lease and applying in the same manner as therein contained, so far as the same is not repugnant to anything therein contained.

In witness whereof, the mayor and aldermen of the city of Savannah and hamlets thereof have hereunto set their hands and caused the corporate seal of the city to be affixed this first day of March, eighteen hundred and sixty.

Signed, sealed and delivered in presence of—
(Signed by mayor and seven aldermen.)

[SEAL.]
Attest: R. W. COPE,
Clerk of Council.

E. MENDEL,
Notary Public.

Form of Original Transfers of Ground Rent or City Lots Entered on the Books of Registry of said Lots in the City Treasury.

Lot No. 25, Berrien ward.

STATE OF GEORGIA, }
City of Savannah. }

For value received I hereby transfer, assign and set over to John Scudder all my right, title, claim or demand which I may have in law or in equity unto the above lot of land known as lot No. 25, Berrien ward.

A. A. SMITH. [L. S.]

Attest: EDWARD H. WILSON, *J. P., N. P.*
JAMES S. WILKINS.

55 No. 1, Chatham ward.

SAVANNAH, GA., *April* 28, 1856.

For value received I hereby transfer and set over unto Mrs. Ann B. Bates all the right, title, interest, claim or demand in law or in equity which I may have to lot No. 1, Chatham ward.

B. CONSTANTINE.

In presence of—
EDWARD G. WILSON,
J. P., N. P. No. 6, Forsyth Ward.

Form of Original Transfers of Lots in Springfield Plantation, Entered on the Book of Registry of said Lots in the City Treasurer's Office.

Lot No. 7.

STATE OF GEORGIA, }
Chatham County. }

For value received I hereby transfer and set over unto Daniel A. Stewart of the city of Savannah, all the right, title and interest, claim and demand whatsoever I may have in law or equity in or to the above lot of land.

Witness my hand and seal this 3d day of March, 1857.

JOHN SCUDDER, *Extr.* [L. S.]

Witness:
SAM'L R. PALMER.
JAMES S. WILKINS.

Lots 29 and 30, Springfield plantation.

STATE OF GEORGIA, }
Chatham County. }

SAVANNAH, *April* —, 1854.

For value received we hereby transfer and set over unto John D. Delannoy of the city of Savannah, all our interest, right, title, claim and demand in law or in equity which we may have in or to the above lots of land.

GEO. W. WYLLY.
JOHN S. MONTMOLLIN.

Signed in presence of—
JOSEPH W. ROBERTS,
EDWARD G. WILSON,
J. P. & N. P.

Resolved, That the city marshal advertise for sale on Mon-
56 day, 18 April, inst., at 10 o'clock a. m., the city lots in Jasper, Pulaski and Lafayette wards, lying on and south of Harris street, stating conditions of sale, mode of payment, etc., in conformity to ordinance and a resolution passed at former meeting of council.

Min. 7 April, 1842.

Report of majority of finance committee on application of Mrs. Ann White to have increase money paid by her husband on lot 23, Columbia ward, refunded to her, amounting to $255.

As far as the committee have been able to ascertain, all the statements set forth in the petition are true, yet they cannot perceive how they should constitute a claim upon the treasury either in law or equity. It is presumed all the forms of law were complied with by the marshal in the re-entry and sale and it may also be presumed that though the purchase was an unfortunate one for Col. White, the city has also been a loser by the sale to him, suppose for instance that instead of Col. White's bid, the bid of the person before him had been accepted, it is probable the lot instead of laying vacant, would have been long since improved, in which case the city would not only have received its ground rent, but taxes on the improvements, with these views * * * the committee recommend that it be rejected.

Min. 11 August, 1842.

Report of Real Property Belonging to the City.

Real property paying 5 per cent. rent—

On valuation	$69,635 00
Lots paying 5 per cent	137,077 00
Buildings	45,500 00
Unproductive property	278,500 00
Investment railroad stocks	513,300 00
	$1,064,012

Min. Dec. 1, 1842.

On March 3, 1791, it was ordered that notification be posted under the vendue and market houses, informing the purchasers of lots who have paid their increased money that council will meet on Saturday afternoon at 4 o'clock to deliver their titles and receive their obligations with security as required by ordinance.

The following titles were duly executed in council, the parties having given bond with approved security, according to the ordinance:

57 To John Shick for lots 28, 29, Franklin ward.
To Chist Gugel, lot 4, Washington ward.
To Gabriel Seavers, lot 34, Franklin ward.
To John Haupt, lot 14, Franklin ward.
To Joseph Clay, Jr., lot 11, Franklin ward.
To Joseph Habersham, lot 9, Franklin ward.
Min. June 21, 1791.

That notice be given in two places in the city, and in the Gazette that council will sell on July 1st, next, at public auction, on the premises, for seven years, to the highest bidder, the lease of the filiature on the foregoing terms:

That further notice be given in the Gazette that council will sit

at the court-house on Friday, 24, and on Friday, 1st of July, next, for the express purpose of executing titles to the purchasers of lots lying in the east and west common, and unless they avail themselves of such notice they will be proceeded against agreeably to the ordinance in that case made and provided.

Council executed titles to the following persons, they having given bond and approved security, as required by law:

Anne Cuthbert	Lot	30	Franklin.
Benj. Oakman	"	25	"
Benj. Oakman	"	32	"
Abial Brown	"	21	"
John Welcher	"	2	Washington.
Thos. Gibbons	"	8	Franklin.
Donald McLeod	"	22	Warren.
Emil De Lamotter	"	22	Franklin.
John Robert	"	13	Washington.
John Robert	"	14	"
Jos. Cuthbert	"	26	Franklin, p. 78.
Jos. Cuthbert	"	27	"
John Hamilton	"	23	Washington.

Ordered, that the vendue-house be leased on the 1st October next to the highest bidder for one year, the purchaser giving security for payments of rent.

Min. Sept. 2, 1794.

Mr. Berrien, agreeably to ordinance, reported that the following lots had reverted to the city in terms of the ordinance, viz:

9 lots, 3 in Franklin, 4 in Washington, 2 in Warren.

On application of William Clark praying to relinquish to Mr. Charles Washington, his right and title to No. 25, Warren ward, which he purchased at public sales and which relinquishment on the part of said Clark, and consent to receive was entered into before council.

58

Resolved, That council will execute titles to the said Mrs. Washington of said lot, whenever it shall appear that all increase money and arrearages of rents shall have been paid.

Similar petition by Nicholas Turnbull to relinquish his right and title to his lots Nos. 23 and 24, Warren ward, to John Berrien and to lot 12, Warren ward, to James Box Young; ordered, that council will, immediately after all ground rent and increase money shall have been paid, execute titles to Berrien and Young.

Similar petition by Phenis Miller for permission to transfer his right and title of his lot No. 30, in Washington ward, to Hon. Nathan Pendleton.

Resolved, That he be at liberty to transfer his said lot and that council executes titles to Mr. Pendleton, when all arrears of ground rent and increase money shall be paid.

Min. April 6, 1801.

That public notice be given of sale of 40 lots in Elbert square.

April 20, 1801, Joseph Clay, Thos. Young, Geo. Jones, Jno. P. Ward and Ulric Tobler or any three of them, a committee, to sell lots on Tuesday, 2d June next, at 10 o'clock.

On motion of Alderman Eppinger, resolved, that the treasurer and marshal be required to furnish the council at their next meeting, a statement of the real and personal estate belonging to the corporation, with an estimate of the value of such description of property annexed thereto.

The city treasurer and city marshal, in compliance with the resolution of council of 17th inst., made the following statement of the real and personal estate belonging to the corporation, with an estimate of the value thereof annexed thereto.

Real Estate Belonging to the City of Savannah.

32 lots in Berrien ward, paying 6 per cent. per annum, valuation	$21,426 47
41 lots in Jackson ward, paying 6 per cent	22,723 32
Amount paying rent at 6 per cent	$44,151 79
32 lots in Columbia ward pay- 5 per cent	27,347 79
34 lots in Elbert ward	22,995 30
31 lots in Franklin ward	18,123 88
16 lots in New Franklin ward	14,804 66
59	
31 lots in Green ward	17,293 76
29 lots in Liberty ward	16,100 00
19 lots in Warren ward	7,157 32
32 lots in Washington ward	9,704 14
11 lots in Springhill, paying 5 per cent	5,500 00
3 lots in the canal	7,700 00
Filiature lot on Reynolds square	2,000 00
Amount paying rent at 5 per cent	$148,736 85
Market in Ellis square, net revenue from which about 8½ per cent. on the valuation	20,000 00
Exchange building, part of which is rented for	630 00
The remainder, used for city officers, council chamber and other purposes	20,000 00

Amount of value of real property which now produces a revenue to the city:

Amount of value of city lots paying 6 per cent	41,151 79
Amount of value of city lots paying 5 per cent	148,736 85
Market and exchange building	40,000 00

	Real property from which no revenue is at present derived:	
5 lots in Berrien ward in possession Chatham academy.		4,000 00
1 lot, No. 48, Jackson ward		450 00
76 lots east of cemetery and south of S. Broad street, at $300		22,800 00
9 lots in Liberty street and south of the cemetery		2,700 00
Town common, south of Liberty street and between the eastern, southern and western boundaries of the city, which, according to a map of the city, certified to by Mr. McKennen and Wright in 1829, may be laid out into 406 lots, 10 of which have been sold to the United States, remainder 396 lots, valued at $300		118,800 00
12 lots Springhill, including 25-acre lots		7,060 00
Eastern moiety of Fig island		500 00
Value of unproductive real property		167,310 00
	Total value of real estate of the city	400,198 64
	Personal property:	
100 shares in Savannah, Ogeechee and Alabama canal		10,000 00
6 slaves		1,850 00
	Total value of real estate brought forward	$400,198 64
60	Value of personal property brought forward	11,850 00
	7 mules and 1 horse	500 00
Carts, &c., &c., for scavenger department		200 00
Value of personal property		125,500 00
	Total value of property belonging to the city of Savannah	$412,748 64

Lot letter S, Reynolds ward, be set up and exposed for sale at valuation of $3,000, on the same terms and conditions with lots in Jasper and other wards south of Liberty street, and on further express condition that no wooden building shall ever be erected on the lot.

The mayor's reports, made annually to council in pursuance of ordinance and published for information, commencing as far back as published reports have been found, to wit, October 31, 1854, and up to the year 1877, contain the following:

Statement of the Resources of the City of Savannah, October 31, 1854.
Report of John E. Ward, Mayor.

Stocks at par value (here follows a -ment of the various railroad and other stock owned by the city and valued at)			$899,500 00
City domain:			
643 lots, 22 wards, under lease	$488,192 29		
36 lots, Springfield plantation	19,234 80		
		$507,427 09	
Lots laid off and valued, not under lease		70,200 00	
Approximate value of land not laid out and valued 20 lots south of hospital	18,000 00		
20 lots east of hospital	20,000 00		
		38,000 00	
9 acres old Cantonment ground, reserved for city lots		20,000 00	
Remainder of Springfield plantation		80,000 00	
61			
Site purchased for water works		22,000 00	
			737,627 09
Stock and domain as above			$1,637,127 09

October 31, 1855.—Report of E. C. Anderson, mayor, omitting statement of stocks at par, has the following statement as to city domain:

644 lots in 22 wards under lease, valued at	$489,902 20
36 lots in Springfield plantation	19,234 80
Lots laid off and valued, not under lease	70,200 00

Other property not laid off nor valued, but approximate value given.

October 31, 1856, E. C. Anderson, mayor, contains a similar statement of city domain. Similar statements are also contained in the mayor's reports for 1857, 1858, 1859, 1860, 1861, 1862, 1863 (no mayor's report for the years 1864 and 1865), 1866, 1867, and so on each year through 1877. The value of the city lots reported under lease were variously stated from the valuation in 1854 at $488,192.29, which continued about that average until about the year 1871, when the valuation was increased to 693 lots under

lease valued at $2,015,000.00, and continued at that valuation until 1877.

In settling with Mr. Ephram Cooper for taking part of lot in New Franklin ward the committee of council recommended payment of $250 to be deducted from the valuation, and a new lease granted for 58 feet, &c.—Min. June 30, 1806, p. 255.

Resolved, That the treasurer report to council at their next meeting the amount due the city for rents on city lots.—Min. Dec. 22, 1806.

Treasurer having laid before council a statement of rents due for city lots July 28, 1807.

Memorandum of "fee-simple" lots taken from records in possession of city treasurer.

Date.	Lot No.	Ward.	Tything.	Assessed value.	Rate.	Amount.	Per cent. off.	Amount paid.
1808	4	Percival	Moore	$2,000	25c.	$5 00		$5 00
1808	10	"	"	2,500	per	6 25		6 25
1808	1	"	Sloper	2,000	$100.	5 00		5 00
1871	1	"	"	5,000	1 p. c.	50 00		50 00
1878	1	"	"	2,000	2½ p. c.	50 00	5	47 50
				Average value about				Per year
1873	.....	Cuthbert	.....	1,200	1 p. c.	.....	.....	12 00
1878	.....	.....	.....	350	2½ p. c.	8 75	5	8 31¼

Lot.	No.	Ward.	Appraised value.	Increase.	Total value.	Unpaid balance.	Rate. per cent.	Annual ground rent.	Paid on since—
	7	Greene			$775 00	$652 50	5	$32 67	1805
	9	"	$250 00	$700 00	950 00	855 00	5	42 76	1805
	10	"	200 00	470 00	670 00	603 00	5	30 16	1805
	36	Liberty				600 00	5	30 00	
	29	"			930 00	600 00	5	30 00	
	1	Warren			604 28	428 57	5	21 44	
	2	"			432 85	364 28	5	18 22	
	6	Washington			366 42	321 42	5	16 08	
	8	"			449 99	385 21	5	19 28	
	8	Greene	250 00	750 00	1,000 00	900 00	5	45 00	1805
	6	Lloyd	1,200 00	150 00	1,350 00	1,080 00	7	75 60	
E. ½	17	"	1,300 00	850 00	2,150 00	1,720 00	7	120 40	
	20	"	2,800 00	1,500 00	4,300 00	3,440 00	7	240 80	
	28	"	1,500 00	435 00	1,935 00	1,548 00	7	108 36	
	30	"	1,600 00	195 00	1,795 00	1,436 00	7	100 52	
	33	"	1,400 00	175 00	1,575 00	1,260 00	7	88 20	
	41	"	2,500 00	625 00	3,125 00	2,500 00	7	175 00	

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64 *Taxes Collected from Plaintiffs in Addition to Ground Rent.*

	Valuation.	1890.	1891.	1892.	1893.	1894.	1895.	1896.
David Wells	$15,000	$225 00	$225 00	$225 00	$225 00	$225 00	$225 00	$225 00
Wm. Kehoe	2,700	40 50	40 50	40 50	40 50	40 50	* 29 25	29 25
D. G. Purse	4,000	60 00	60 00	60 00	60 00	60 00	60 00	60 00
T. Ballantyne	3,300	49 50	49 50	49 50	49 50	49 50	49 50	49 50
H. Blun	4,900	73 50	73 50	73 50	73 50	73 50	73 50	† 43 50
C. M. Gilbert & Co	9,250	138 75	138 75	‖ 146 25	146 25	146 25	146 25	146 25
R. McIntire	19,950	299 25	299 25	299 25	299 25	299 25	299 25	§ 288 75
M. E. Douglass	5,200	78 00	78 00	78 00	78 00	78 00	78 00	78 00
D. O'Connell	800	12 00	12 00	‡ 17 25	17 25	17 25	17 25	17 25

* Valuation appears as $1,950 00
† " " " 2,900 00
‖ " " " 9,750 00
§ " " " 19,250 00
‡ " " " 1,150 00

Aggregate Payments.

Wells	$1,575 00
Kehoe	261 00
Purse	420 00
Ballantyne	346 00
Blun	484 00
Gilbert	1,008 25
McIntire	2,084 25
Douglass	546 00
O'Connell	110 25

65 The city marshal reported to city council the sale of city lots under the ground-rent plan from time to time during the following years:

1870.			
March	3.	Lot 61, Forsyth ward	$4,575
"	17.	Lot 21, Wesley ward	1,527
"	31.	Lot 38, Lloyd ward	2,005
"	31.	Lot 39, Lloyd ward	2,010
"	31.	Lot 46, Lloyd ward	2,010
"	31.	Lot 51, Lloyd ward	2,700
"	31.	Lot 52, Lloyd ward	2,900
April	13.	Lot 10, Charlton ward	2,005
"	13.	Lot 74, Stephens ward	3,525
1871.			
Oct.	11.	Lot 44, Stephens ward	1,827
"	31.	Lot 57, Lloyd ward	3,080
Nov.	23.	Lot 59, Forsyth ward	2,625
Dec.	31.	Lot 17, Lloyd ward	4,300
"	31.	Lot 18, Lloyd ward	3,850
"	31.	Lot 20, Lloyd ward	4,300
"	31.	Lot 62, Lloyd ward	2,800
1871.			
Feb.	28.	Lot 58, Lloyd ward	2,750
"	28.	Lot 63, Lloyd ward	2,275
"	28.	Lot 70, Lloyd ward	2,310
April	11.	Lot 48, Forsyth ward	4,250
"	11.	Lot 75, Lloyd ward	3,375
"	25.	Lot 25, Forsyth ward	2,100
May	11.	Lot 9, Crawford ward, east	2,230
"	25.	Lot 51, Crawford ward, east	2,250
"	25.	Lot 52, Crawford ward, east	3,130
June	7.	Lot 42, Stephens ward	2,265
"	7.	Lot 43, Stephens ward	2,655
"	7.	Lot 46, Stephens ward	2,550
1872.			
1871.			
June	7.	Lot 41, Forsyth ward	2,330
"	7.	Lot 44, Forsyth ward	2,355
"	28.	Lot 32, Lloyd ward	2,700
Sept.	25.	Lot 57, Forsyth ward	2,525
"	25.	Lot 41, Lloyd ward	3,125
"	25.	Lot 44, Lloyd ward	3,175
1872.			
Feb.	29.	Lot 6, Crawford ward, east	1,140

To this report the city marshal adds, "Owing to the resolution passed by the city council requiring cash payments instead
66 of the old ground-rent system, application- for lots have ceased."

In the mayor's reports for 1873 the city marshal reports but two

lots sold—and from 1874 to 1878 inclusive that there have been no demands for sale of lots.

In 1879 he sold lot 48, Lloyd ward, for cash, $375.

Lot No. 59, Lloyd ward, one-fourth cash, balance in one, two and three years, for $351.

In 1880 lot No. 12, Charlton ward, for $451, one-third cash, balance in one and two years.

Lots 45, 46, 47 and 48, Wylly ward, for $913 cash.

Lot 41, Forsyth ward, for $550, one-third cash, balance in one and two years.

The grand jury having recommended the necessity of a guard or city watch on the 17th of June, 1805, the committee of the city council made the following report: "It appears to your committee that the expense of the city watch or guard is far beyond the reach of the present resources of the corporation, and on examination of the acts of the legislature by which the city council is constituted and by which its powers are defined, your committee find that the power of raising money by taxation is confined to the mere purpose of defraying the ordinary incidental expenses of the corporation, it is therefore earnestly to be wished that our successors in office may present a memorial to the legislature praying for their interposition and aid by an act either increasing the powers of the incorporation in this respect or for levying a certain tax to be appropriated to the support of a city guard or watch, under the immediate control and direction of the corporation."

The finance committee were requested to report the sums received the last year, and on what account, so as to afford a general review as well of the services from which the revenue of the city has arisen as of the uses to which it had been appropriated. The finance committee submitted a statement of the treasurer's receipts, etc., for the last year, as follows:

Receipts.

By cash received for ground rent	$7,472 63½
" " " " stall rent	652 00
" " " " fines	3,634 71
" " " " extra market fees	57 43¾
" " " " licenses	4,675 00
" " " " theatrical ex	210 00
67	
By cash received for lots sold	345 60
" " " " badges	322 00
Bal. in treasury 17th July, 1804	3,052 54½
	$20,421 92¾

At a special meeting, Dec. 9, 1805, the mayor laid before council an act of the legislature lately passed authorizing the mayor and aldermen to assess and levy a tax for the purpose of establishing a regular watch in the city.

At the same meeting a committee was appointed from the aldermen to prepare and report a bill for assessing and levying the tax.

At a meeting on Friday, Jan. 3d, 1806, this committee reported a bill to council for assessing and levying the tax, which was read for the first time.

This bill was taken up and debated at the meeting of council of Feb. 1st, March 24th and 27th, and was ordered to be twice published for the inspection of the citizens.

On April the 7th, 1806, the bill was read the third time, and passed into an ordinance under the title of an ordinance for the support of a watch in the city of Savannah; and it was then ordered that the same be signed by the mayor and published in the Gazette of this city.

The ordinance then adopted so far as applicable to this case, was as follows:

"An ordinance to raise a fund for the support of a watch in the city of Savannah.

"1st. Be it ordained, by the mayor and aldermen of the city of Savannah, and it is hereby ordained by the authority of the same, in conformity with the act of the legislature in that case made and provided, That for supporting a public watch in the city of Savannah, a tax shall be levied on property and persons within the limits and jurisdiction of the said city, as follows, to wit: On all houses, buildings, lots and wards within the said city, as well unimproved as improved, and including all lots held by lease from the corporation, twenty-five cents on every one hundred dollars thereof, to be assessed and valued by the assessors appointed by virtue of this ordinance, and to be paid by the owner thereof.

"2d. * * *."

At the meeting of council May the 19th, 1806, it was resolved that this tax ordinance should be recommitted to a select committee to report to council at their next regular meeting such amendments as they should deem necessary. Aldermen Howard, Williamson and Davis were selected as this committee.

68 At the meeting of council on August 25th, 1806, Aldermen Fleming, Harden and Williamson were appointed a committee to revise the said tax ordinance, and to report by bill such amendments as they may deem necessary and proper.

On September 8th, 1806, the committee appointed to revise the ordinance reported that they had taken the liberty of recommending a few alterations in the said ordinance and for that purpose herewith a bill.

The amended ordinance so reported was read the first time and ordered to be read a second time at the next regular meeting.

On October 27th, 1806, the ordinance was read a second time and debated, and at a special meeting of council held at 4 o'clock p. m. of the same day, the ordinance was again taken up, further debated and amended in part, and it was ordered that the further consideration of the same be postponed until the Monday next.

On November 10th, 1806, the ordinance was again considered and amended and ordered to be engrossed for a third reading at the next regular meeting, and on November 24th, 1806, it was read a third time and passed.

The ordinance so passed was as follows:

"An ordinance to amend an ordinance entitled An ordinance to raise a fund for a watch for the city of Savannah, passed April 7th, 1806.

"1st. Be it ordained by the mayor and aldermen of the city of Savannah, in council assembled, and it is hereby ordained by the authority of the same, That so much of the first section of the aforesaid ordinance as imposes a tax on lots held by lease from the corporation * * * be, and the same is hereby repealed."

It is admitted and agreed that every tax ordinance to raise revenue for the city passed by the mayor and aldermen from the above ordinance of November 24, 1806, up to and including the ordinance of January 22, 1857, used the same expression as above quoted, to wit: "Excepting lots held by lease from the corporation."

An ordinance to prescribe the mode of assessing and collecting taxes in the city of Savannah, passed December 11, 1857, Wilson's Digest, page 440, provides: Section 3. "The phrase 'real property' as used in this ordinance shall be construed to include land itself, and all buildings and other fixtures erected upon land, whether the land upon which such buildings and other fixtures may be erected be, or be not itself, subject to taxation. Section 4. The following real property shall be exempt from taxation, to wit: Each
69 lot of land held at the time of the passage of this ordinance upon the payment of ground rent to the mayor and aldermen of the class commonly called city lots." * * *

The tax ordinances from 1866 to 1874 in assessing the tax on real estate in said city used the following language: "Taxes shall be assessed, levied and raised at and after the following rates, that is to say: 1. At the rate of — per cent. per annum on real estate in said city according to the valuation of the year ——."

The tax ordinances of the years 1874, 1875 and 1876, assess the tax on real estate in the following language: "Every person holding real property in said city, including improvements on lots subject to ground rent, shall pay a tax of — per cent. on the value of such property."

In the comparison of the tax digests in the mayor's reports of Thomas M. Turner for the year 1858, of R. D. Arnold for the year 1860, of C. C. Jones for year 1861, of Thos. Purse for year 1862, and of Thomas Holcombe in 1863, and, also, the same statement in the published ordinances of the city by Edward G. Wilson, page 538, is the following statement: "City lots or lots under lease not being liable to city taxation, are not included in the above comparisons."

The annual report of John Screven, mayor, for the year 1871, the following from page 5:

After setting forth a table showing the increase in value of the taxable real estate within the city for the last three years, proceeds as follows: "These statements do not, however, express the full value of all the real estate in the city of Savannah. It is not known to the foreign public that a very large part of the real estate in the city consists of lots sold on condition of the payment of ground rent, and are, therefore, not the subject of taxation, and are not included in the assessments. These lots, six hundred and eighty in number, constitute a large part of some of the most valuable real estate in the city, and if included in the statement of taxable real estate, would, at a moderate estimate, raise its figures to more than seventeen and a half millions of dollars. A knowledge of this condition of so large a part of the public resources is important to a correct appreciation of the extent of the real estate within the city, and to a just maintenance of the public credit, and for these reasons, involving a matter of sound public policy, the ground-rent lots should be assessed contemporaneously with those held in fee-simple, not with a view to their taxation, but to ascertain correctly the value of all real estate within the city."

It is admitted that the reports of the city treasurer made to city council of the receipts of money from all sources show that no taxes were received from real or personal estate from July 16, 1803, until after the passage of the tax ordinance of November 24, 1806, when the treasurer's report of August 21, 1807, shows:

Receipts on account of city-guard tax:

Received from 736 persons taxes...	$8,962 06¼
Received from 31 persons on commissions on sales....	714 60

It is admitted and agreed that lots known as "city lots" or "ground-rent lots" the right to tax, which is now asserted by the city, were never assessed for taxation until under the ordinance of May 29th, 1878. That said lots are omitted from the assessment books of real estate for city taxes from the first assessment book made in 1807 up to the assessment book made out in the year 1878, which assessment continued in the assessment books of 1884 and 1890, but is omitted in the assessment books of 1888.

It is further admitted that no city taxes were ever levied on said city lots until after the resolution of council of November 17th, 1889, under which these lots have been assessed for city taxation for the year 1890.

It is admitted that no taxes were assessed or levied under the ordinance of April 7, 1806.

It is admitted that no taxes have ever been claimed on the lots known as city lots from the year 1791 to the year 1878; and that the ordinances of May 22, 1878, 1880, 1881 and 1882, assessing a tax on said lots specifically were never enforced, but were suspended by a resolution of council adopted May 23, 1883; and that the levy of the executions in the cases at bar are the only levies that have been

made for taxes on said city lots from the year 1791 until the filing of this petition.

It is admitted that all the lots known as city lots were sold by the city before the year 1872.

It is further admitted and agreed that the holders of city lots have always paid State and county taxes and street improvements and assessments for sidewalks, and all other assessments and burden common to lot-owners in said city except city taxes.

It is admitted that as early as the year 1805 and 1809 that
71 the city had prepared separate digests or registers, to wit: A registry of city lots, and registry of lots in fee-simple.

The committee on finance to report generally on the finances of the city, reported as follows:

The committee on finances, having met from time to time and examined into the state of the finances, report the following as their condition:

The whole debt of the city at this time, funded and unfunded, exclusive of the current monthly expenses, amounts to five hundred and forty-seven thousand seventy-four dollars and seventy-five cents, viz:

City scrip, new emission, in circulation.....	$51,739 00
Corporation notes, old emission and unredeemed.....	2,335 75
Mayor's notes on the Central R. R. bank....	3,000 00
And bonds of $1,000, each dated 1st July, 1839.....	490,000 00

at 7 per cent. interest, principal payable in twenty years and interest semi-annually at the Manhattan bank, N. Y.

These may be considered, with the exception of the mayor's notes, as the permanent debt of the city, and on a large portion of which the interest must be provided semi-annually, viz: upon the whole of the bonds of one thousand dollars dated the 1st of February, 1839. The city scrip is at a mere nominal interest and therefore requires no provision from this board until it is ordered to be redeemed. The semi-annual interest on the funded debt will become due on the 1st February next, and amounts to the sum of $17,321.50, including premium. This the committee would recommend to provide for by authorizing the mayor to negotiate a loan wtth the banks of the city until the anticipated resources of the city come into the treasury, say the 1st May, 1842. A like sum will have to be provided for the semi-annual interest upon the funded debt for the last half of the fiscal year.

Next in order, the committee report the estimated ordinary expenditures of the year, the main items of which are made up of the expenditures of the city watch, the scavenger department and the salaries of the various officers, at $43,632.50.

There is to be added to this the extraordinary expense for repairs and improvements of the city and the city property, such as erecting stables, building sewers and repairing the jail, estimated at $3,058.27. These sums, with the interest of the funded — before mentioned, will bring the whole expenses of the current year to the estimated sum of $81,335.87, $65,701.00 of which are the estimated

aggregate expenses of the city, exclusive of the interest upon
72 the funded debt. The committee have more anxiously deliberated upon every possible means of meeting this large expenditure, and it has as yet been able to discover none other than the old-fashioned one of taxation. It is scarcely worth while at this late day to discuss the prudence of entering into the largest items of these liabilities, it is sufficient that they were authorized by the citizens themselves in primary meeting. It therefore becomes them to meet the necessary consequences manfully and promptly. There is perhaps as much city scrip in circulation as the daily wants of the people require, and to issue more would only result in throwing it as a dead weight upon the banks. It will be perceived by the board from the accompanying tables and calculations that the fifty cents additional tax of last year, if laid for this, would not meet the estimated expenditures by something like $20,632.87. In order to raise this sum the board will have to levy additional taxes upon those objects already burthened with heavy rates, or they must seek new sources of revenue from those which have hitherto contributed little or nothing to the support of the city.

The committee are unanimously of opinion that these new sources may be found in the incomes of professional men and commission merchants. The present income from these sources may be estimated in round numbers at about one thousand dollars now, when the estimated sales of cotton alone for the present year will amount to something like 210,000 bags, yielding six millions three hundred thousand dollars, and that the commission of purchase and sale upon them at 2½ per cent. will amount to something like three hundred and forty-five thousand dollars, it will appear to the board how disproportioned have been the taxes imposed upon this class of dealers compared with that paid by their fellow-citizens.

The committee therefore recommend that in addition to last year's rate of taxation there be imposed upon all professional men, commission merchants, brokers and dealers in rice, cotton and lumber, a tax of half per cent. upon their incomes, to be ascertained by returns made upon oath by themselves annually, and to be compulsory as more fully to be provided and set forth in the ordinance hereafter to be reported, should the board think proper to adopt the suggestions of the committee.

This plan, the committee is credibly informed, has been in successful operation in Charleston for many years. The estimated receipts from this source amount to seventeen thousand two
73 hundred and fifty dollars, which, added to the estimated means from other sources, will yield the sum of $85,951.00, leaving a probable balance in the treasury at the end of the year of $1,617.13.

The fund invested in the stock of the Savannah, Ogeechee and Altamaha canal, as well as the loan to said company, both principal and interest, the committee believe to be wholly unavailable, should the company ever be able to pay anything either of the principal or interest, it is recommended to apply the means so received

to the redemption of the city scrip, now in circulation, a large portion of which was issued to effect that loan.

There will probably be received into the treasury during the year the sum of $2,535.00 from executions set apart, as against persons owning and representing property, and there are others considered doubtful, also left in the hands of the marshal to the amount of $3,271.10, a portion of which may be collected during the elections which may be held during the year. From both of these sources there will be in all probability, sufficient collected to liquidate the mayor's note, now remaining in bank. To meet any possible contingency by which the estimated resources of this year may fall short of the estimated expenditures, the committee recommend the immediate sale of a portion of the city domain, which, it is believed by the undersigned, may now be effected to considerable advantage, and they are led to believe that many lots are wanted for the purpose of building.

There may also be a falling off in the estimated resources from the tax on incomes, in consequence of our inability to define accurately how much of the cotton and rice estimated as the crop of the year, may be sold on commission, so much of it as may be purchased and shipped by owners without commission would of course fail to yield any revenue, but it is believed by the committee that any such deficiency will be more than made up by the tax on sales and purchases of lumber and other merchandise sold on commission.

There is submitted, appended to this report, a series of questions by the committee and answers by the treasurer, which will furnish in a clear and more detached manner everything relating to the finances of the city which the board or the citizens may desire to learn. The committee would recapitulate the sum and substance of the foregoing thus:

Estimated liabilities on the city for the current year:

	Interest on public debt	$34,634 00
74	Ordinary expenses	43,632 50
	Extraordinary expenses	3,058 37
	Mayor's note	3,000 00
	Aggregate	$84,333 87

Estimated resources of the year:

From taxation at rate of preceding year	$65,701 00
From tax on incomes	17,250 00
From executions and sales on damage	3,000 00
	$85,951 00

Estimated balance at end of the year, $1,617.13.

ELIAS REED,
W. A. CARUTHERS,
RICHARD D. ARNOLD, *Committee.*

Meeting Dec. 16, 1841.

Min. April 25, 1839, p. 148.

An ordinance passed pursuant to resolutions of Dec. 16, 1841, on report of finance committee.

Ordinance amendatory of and in addition to existing tax ordinances of city of Savannah for raising supplies for support of a watch and for other purposes.

Preamble.

Whereas, in the opinion of this board the revenue of the city arising from ordinary sources and from taxation under the existing tax ordinances will be inadequate to meet the demands upon the city for the ensuing year by reason of the debt created by the subscription to the stock of the Central R. R. and of the deficiency in the usual revenue by the suspension of dividends by the Central R. R. and Banking Co. of Ga. And whereas, in consequence thereof, it is deemed by this board expedient and necessary to continue the ordinances of the last year, adding fifty per cent. on the amount of taxes imposed by the previously existing ordinances of the city.

And whereas, there are various pursuits, occupations and business yielding lucrative incomes and profits to those engaged in them which now bear none or a very inconsiderable portion of the burden of taxation, and it being considered by this board expedient and just as far as possible to equalize that burden among all classes of citizens and in proportion to their advantages and means.

75 SECTION 1. Ordained, that the ordinances passed on 19 March, 1841, by which 50 per cent. was added on the taxes imposed by previously existing ordinances be, and the same is hereby reordained and continued in full force for one year longer.

SEC. 2. On gross amount sales of negroes, goods, wares, merchandise and other commodity and sold in corporate limits by any person on commission, percentage or premium, 50 cents on every hundred dollars of the amount of such sale, except not to extend to rice, cotton or lumber, or goods, etc., sold at public auction by vendue masters, parties to make returns on oath 1st May annually.

SEC. 3. On sales of rice, cotton and lumber, 25 cents on every $100.

SEC. 4. Persons liable to tax and failing to return, should be liable to tax $200 and *fi. fa.* to issue.

SEC. 5. From income from commission charged on purchases and collections of freight, 1 per cent. return on May 1st, or $200.

Purchasing cotton, rice, ¼ of 1 per cent.

SEC. 6. Profits from pursuit of profession, law or physic, on incomes under $1,000, $7.50; under $1,500, $12; $2,000, $17; $2,500, $22.50; over $2,500, $25.

$40 if no returns. Mechanics exempt.

SEC. 7. Dentists, $15.

SEC. 8. Public officers of State, county and city, and bank clerks, with salary, &c., $1,000, $1 on every $100.

SEC. 9. Transient trader, $50.

SEC. 10. Horse-, mules, $1 on each brought to be sold.
SEC. 11. Repealing clause.
Passed January 24, 1842.

Extracts from minutes of city council, meeting of Jan. 17th, 1872.

* * * * * * *

Reports Adopted.

The finance committee beg leave to report upon the communication of Dr. L. A. Falligant with respect to the taxation of what are called "city lots," that they find it unnecessary to consider the nature of the estate vested in the purchaser of such a lot. That subject seems to have been fully disposed of by a decision made in the superior court of Chatham county in January, 1807, which, so far as your committee are informed, has ever since been accepted as settling the law of the case.

The reason why city lots are not taxed beyond the ground
76 rent is that the city is understood to have bound itself not to tax them.

The ordinance of 1799, which was the first to provide for the sale of lots on these terms, contains a stipulation that the purchaser of such a lot, and all claiming under him, shall have the use, &c., upon paying the ground rent. This ordinance has been followed, either in terms or substance, by all succeeding ordinances providing for such sale.

It is of no moment that the stipulation does not appear in the deeds, the ordinances contain the real terms of the contracts and control the deeds, whenever the latter depart from or conflict with them. And as the city has never taxed such lots, it is difficult to resist the conclusion that such was the design when the ordinance of 1790 was framed.

Your committee, however, are free to say that they doubt the policy of continuing to dispose of the public domain on such terms. Heretofore lands thus sold by the city have been chiefly, if not wholly, parts of the "common," which could be judiciously used in that way. But hereafter the city will probably have no domain save such as it will have to purchase at a high price, and such land could not be granted in "city lots" free from taxation without a loss, for which no equivalent would be received. And your committee recommend that the committee on public sales and city lots be requested to take this subject into their consideration.

WM. HUNTER, *Chairman.*

An ordinance to tax ground-rent lots, passed in council May 29th, 1878.

SECTION 1. Be it ordained by the mayor and aldermen of the city of Savannah in council assembled, and it is hereby ordained by the authority of the same, That the second section of the above-recited ordinance be and the same is hereby amended so as to read as fol-

lows: "Every person and corporation owning real property in said city, including improvements, shall pay a tax upon said property of two and one-half per centum of the value thereof including ground-rent lots, except on such property as may be exempt from taxation under the laws of this State."

SEC. 2. And it is hereby further enacted by the authority of the same, that all ordinances and parts of ordinances conflicting with this ordinance be and the same are hereby repealed.

77 At meeting of city council of November 19th, 1899, resolution was passed to enforce the ordinance imposing a tax on grount-rent lots and directing that these lots be assessed for taxation for the year 1890.

Depositions of GEORGE W. WYLLY, for the plaintiff, sworn:

Have resided in Savannah since boyhood, at least fifty-five years; spend winters in Florida; visit the city often; have been an alderman far back as 1858 and 1859, and almost consecutively and down to and as recently as 1869; I was chairman of the committee on public sales and city lots most of the time. As such chairman I superintended the sale of city lots and reported the same to council. I have been present at such sales made by the mayor and aldermen under the ordinances passed for that purpose. I attended such sales in the discharge of my duty as chairman of the committee on public sales and city lots. The sales were conducted by the city marshal, who offered the lots to the highest bidder under the terms on which ground-rent lots were usually sold, and under the supervision of the committee. There was always a minimum price or value which was fixed by the city council, or by the appraisers appointed for that purpose; purchasers had the option to buy in fee-simple, paying the entire amount of the bid, or they could take the lot on a perpetual lease, paying 20 per cent. of the purchase-money down and an annual ground rent, payable in quarterly instalments, based on a certain per cent. of the balance of the bid, either 6 or 7 per cent.

The purchaser had the further option to make the lot fee-simple at any time by paying up the balance of the purchase-money and obtaining a fee-simple title from the city. The announcement and terms were made by the city marshal by direction of the committee, and I, myself, as chairman, directed him to do so. He would usually read the advertisement and then the particular lot offered, stating the valuation the city had placed upon it, then state the option that the purchaser could buy either fee-simple or on the ground-rent plan. If fee-simple, the entire purchase-money would be payble on execution of title; if on ground-rent plan, 20 per cent. of bid to be paid in cash and an annual ground rent either 6 or 7 per cent., according to the ordinance, on the balance of purchase-money, payable quarterly; would also announce that so long as the lots were held under ground-rent plan they would be free from city taxes. These announcements were made under authority of the committee. And often when the bidding would lag, the mar-

shal would remind the bystanders that there was only a 20 per cent. cash payment required, and that there was no city
78 taxes, but only an annual ground rent. The mode and manner of sale was uniform and conformed to the plan aforesaid. It was only a repetition of terms which were familiar to every citizen, and only expressed the common and universal understanding of the manner in which ground-rent lots were sold by the city and held by the purchaser. The difference in the terms was that the entire purchase-money would be required to be paid in cash if the purchaser wanted a fee-simple title while only 20 per cent. of the purchase-money was required if the purchaser wanted a lease on ground rent; and to secure the highest prices and highest ground rents the city would further announce the right to hold the lot free from city taxes so long as the ground rents were paid, and the privilege of having the lease changed to a fee-simple title at any time by paying up the balance of purchase-money.

There were no inducements offered to purchasers on the ground-rent plan. They were free to bid either for a fee-simple or a lease. The terms were distinctly announced and parties could exercise their option. A purchaser would be willing to bid more for ground-rent plan than if he had to pay the entire bid in cash. The effect of the offer of such option was to secure the city better prices than would a sale of the absolute title. A striking instance of this was shown in a sale in Lloyd ward where a lot back of the old jail sold on the ground-rent plan for $3,000, and immediately after the sale, at the same time and place, I offered for sale to the same bidders, a lot on the block where the Massie school-house is situate in fee-simple and although further in the city, in location, the same was bid in and sold for about $800 cash.

The city was heavily in debt and large amounts were borrowed from time to time from the banks to meet the obligations of the city. Every kind of property and almost every kind of business—in a word, everything that was considered taxable, was taxed. Ground-rent lots were not taxed because under the contract and terms under which they had been sold, they were not taxable.

There never was a question during the entire period of my services as an alderman as to the meaning of the deed under which the ground-rent lots *was* conveyed by the city. The city had all the powers to re-enter for non-payment of ground rent, and the holder had the right to hold under a perpetual lease as long as he paid the ground rent when due. The city had no power to tax the ground-
rent lots. I feel sure that such was the universal construc-
79 tion of these contracts, and such were the public announcements made from time to time by the mayor in his annual report; and such was the understanding in all transfers of such lots among individuals, and in all sales the lots are described as city lots subject to an annual ground rent. The holders had to pay State and county taxes and city taxes on the improvements and pay for paving sidewalks. They were subject to the same restrictions as to the building line and character of buildings to be erected thereon. No other assessments or burdens were imposed by the mayor and

aldermen at any time within my knowledge, nor did any board of aldermen ever assume to assert the right to impose any others up to the time the city ceased to sell city domain on the ground-rent plan. I own some fee-simple lots and one ground-rent lot or perpetual-lease lot from the city. I know nothing further except that no question was ever raised, that I have any notice or knowledge of, that ground-rent lots were subject to taxes until after the city stopped selling city lots on the ground-rent plan.

The city was often in need of money, but no attempt was ever made to raise money by taxing city lots. The common and universal understanding was that such lots had been sold on a certain ground rent, and so long as that ground rent was paid the city had no other claims on the holder.

Cross-examination:

I do not remember the names of the city marshals, but the records of the city will show who they were during the period I was alderman from 1858 to 1869, inclusive. Some may be dead. The very words used by the marshal in announcing the terms could not be exactly stated by me now, but I have stated them substantially. The city, in the terms of sale announced by the city marshal when selling city lots, made under the supervision of the committee of public sales and city lots, distinctly agreed not to tax ground-rent lots so sold.

The city ordinances levying taxes exempted city lots from taxation and the city in its deeds to these lots required only the payment of ground rent and agreed not to disturb the holder so long as he pays the ground rent. I have read the published official statements of the mayor in his annual reports to the effect and in the precise words, "that city lots or lots under lease not being liable for taxation," are not included in a comparison of the tax digest. I, myself, as a city official, in good faith, have made the state-
80 ment and directed the marshal so to announce when making sales of city lots under my supervision as chairman of the committee on public sales and city lots, and under the common and universal construction of the city deeds the absence of any reservation of a right to tax the lots sold under ground rent had always been construed as an agreement not to tax.

I have held the city lots now owned by me for forty years and over. I do not recollect the exact date of the purchase. I bought it as a ground-rent lot, and never paid taxes on it until last (1891) year. I claim to own it under the perpetual lease originally given by the city, subject to the terms of that lease.

I have bought and sold such property, but always with the distinction that has always been observed as ground-rent lots and not as other property held in fee-simple. The present value of the ground-rent lot held by me is about $7,000. I do not know what I could sell it for, as I have never tried to sell it. If a purchaser were to step in my shoes and have to pay the taxes on the lot, which the city seeks to oblige me to pay in addition to the ground rent I have agreed to pay under original lease from the city, he would not

pay as much as if he had the assurance that the lot was subject only to the ground rent and was not liable to city taxes. I know I could get more money for it as a ground-rent lot not subject to taxation, than I could for it either as a fee-simple lot or one subject to ground rent and taxes.

ALFRED HAYWOOD, for the plaintiff-, sworn:

I am 74 years old and reside in this city. I have resided here since 1842. I have been present at sales of the city domain, known as city lots, sold on what was commonly called ground-rent plan. The terms of sale were announced by the city marshal, who conducted the sale at public outcry. The purchasers could pay 20 per cent. of the purchase price, and retain the balance as long as they pleased, paying on such balance certain interest to be called ground rent, and that the lots thus sold would be free from taxation by the city. These terms were publicly and openly stated by the marshal. The city marshal, and I think the city treasurer, conducted the sale. The terms stated were made as the general terms on which the city offered these lots for sale. I purchased lots from the city at such public sale to be held on ground rent. I was influenced as a bidder by the terms offered and announcements made.

I have been an alderman of the city of Savannah, I think, three times. I served four years. No city taxes were levied or at-
81 tempted to be levied by the mayor and aldermen on the lots known as ground-rent lots, or lots held under lease of the city during that time. I don't think any one then had any idea that they were subject to taxation by the city. That is the only reason why they were not taxes that I can think. During my term of service there was both a large floating and large bonded debt due by the city. The issuing of bonds was resorted to in order to raise money. I think my service was 1869, 1870, 1871, and 1872.

Cross-interrogatory:

I cannot recollect the name- of the city marshals, they are all dead, and I cannot give the exact language used by them, but it was in effect as set out in my answer above. I don't say that the city of Savannah ever at any time formally agreed not to tax ground-rent lots. I do not know of any official action taken thereon by the city. I have heard the city marshal in selling these lots state that they were not subject to taxation by the city, and that they would not be taxed by it. I have heard the marshal say that the city agreed not to tax them. He would use the statement as an inducement to bidders to buy or increase their bid.

I cannot tell the exact date of my purchase, but think it was in 1857. I have always claimed to own the property subject to the payment of ground rent until I had it made fee-simple. I have sold such property as I would other property. I have not bought any.

The following testimony of this witness was ruled out by the court over objection of the plaintiffs:

"The relation between the city and holders of these ground-rent lots were much those of landlord and tenant. So I considered them. The interest or title the city has claimed to have in said lots was fee-simple interest."

GEORGE N. NICHOLS, for the plaintiffs, sworn:

I have resided in this city 75 years. I served as an alderman ten years. During part of the time I was chairman of the committee on public sales and city lots. I cannot swear particularly whether during the time I was chairman I was present at any sales of city lots. George W. Stiles was marshal at the time.

I know of the sale of some of the lots in the south common. According to my best recollection the sale was in 1871. There were three lots offered. The city had valued the lot at so much, and whatever amount over that they would bring; the purchaser
82 was to pay 20 per cent. of the purchase-money, the assessed value and increase money; and the balance was to remain at interest at the rate of 7 per cent., and there would be no other taxes except the interest; no taxes on the property. The property would be exempt. I don't remember anything said at the time about making the property fee-simple. It was optional whether the purchaser paid all down and got a fee-simple title or paid the 20 per cent. and paid ground rent in quarterly payments. It was to be paid in the capacity of ground rent, not interest. If the whole purchase-money was paid the purchaser got a fee-simple title. My lot is ground rent. I bought two lots at that sale. I took them on ground rent. I did not pay any taxes on them. It was understood if I took ground rent I would have no taxes to pay. The effect of this was to make it bring a higher amount. They brought more than they would have for cash.

The lot I own now as trustee is in Chatham ward. I only had to pay the ground rent on that up to five or six years ago. I have to pay $60 taxes on it, I think. The ground rent is $56. The taxes are more than the ground rent.

I think that was the only sale I attended except as one of the members of the committee. Mr. M. J. Solomons was chairman, and I do not remember the other member. I did not speak to the marshal about making the sale. I did not correct him in making the announcements because that was the usual way he did that.

Cross-examination:

Mr. Stiles is dead, and has been for a number of years. In making the sale he stated that the lot would be subject to no taxes whatever, and if the party paid the interest on the balance of purchase-money there would be no other taxes, that is my recollection. I am positive as to it.

My opinion is where a man got a ground-rent deed he did not get title to the property. I was not aware of the court holding differently. I think the minutes of council will show it.

JOHN KELLY, for the plaintiff-, sworn:

I have been a resident of Savannah 46 years. I have been present at sales of lots by the city. I think it was in 1872. Thomas N. Wayne was city marshal; he put the lots up for sale at the valuation the city put on them. I bought one of the lots in Crawford ward, east. I could not swear now that he made the state-
83 ment, but I bought the lot with the understanding that they were to be free from taxes, if I paid the ground rent. I could have bought the fee-simple if I had wanted it. I got my impression that the lots would not be subject to taxes from the public. I would not like to swear that the marshal made the announcement, but think he did. That was the understanding under which I bought the lot.

JOHN C. ROWLAND, for the plaintiff-, sworn:

I was city assessor in 1889, when the assessment was made. At the time we assessed the value of the ground-rent lots upon the same basis as if it had been fee-simple, as to market value.

If a fee-simple lot is next to a ground-rent lot located in same locality, we did not make any difference because one was fee-simple and the other was ground rent. We put on them the same value. If the fee-simple was $4,000 and the ground rent was equally advantageous, we made them the same value. We assessed them at the market value.

The ground-rent lots are not as valuable as fee-simple lots if they are to pay taxes in addition to ground rent.

You could not sell the ground-rent lot for as much as a fee-simple lot, as it would depend upon the location, the amount of the ground-rent money due, its value would be diminished; of course, by the amount due as ground rent. Encumbrances would have to be removed. It is a common occurrence now in selling ground-rent lots for the purchaser to require the ground-rent balance to be paid.

Recross-examination:

When a holder goes to sell a ground-rent lot the purchaser does not step into his shoes and continue to pay ground rent, as a rule, he requires it to be made fee-simple.

THOMAS DANIELS, for the plaintiff-, sworn:

I have purchased a ground-rent lot. I made inquiries as to the terms of sale, because it had been represented to me that it was free from taxes, and I asked the city marshal at the time of the sale if that was so, and he said yes. That was before I bid on the property. Mr. L. L. Goodwin was the city marshal. There was a great deal of difference in the price of the lots when sold on fee-simple or ground rent. The same lots had sold over again the lot next to where I am living and the corner lot where the church is. I bought one of them, Capt. Dillon bought the next to me. The one next to me had sold for $800 or $900 and the corner for $1,000, before that they sold for $2,700 and $3,000 when they sold as ground rent.

84 Cross-examination:

Mr. Goodwin, who is now dead, represented to me that they were not subject to taxes. It was the general impression at the time that they were not subject to taxes. That was lot No. 46, Stevens ward. In 1869 or '70; in 1869, I think it sold for $2,700, and in 1878 or '79, I think it was 1878 it brought $800 or $900. The great yellow-fever epidemic of 1876, which occurred in the summer and fall of that year, had the effect of depreciating the value of real estate for some time. Real estate was very flat for some years, not a great many, after that. Other lots were sold and afterwards, in the case of Mr. Butler, whose house had burned down, the lot was re-entered and resold. In the first sale it brought $3,000; in the resale on fee-simple, $800; the reason for the difference is that on ground rent the purchaser only paid one-fifth down in cash and would be exempted from taxes, paying interest on the balance by way of ground rent. That was my object in buying, and that is the way I considered it. Lots sold for more than one-half less as fee-simple.

Recross-examination:

City lots sold at the same time as fee-simple would sell for more than twice as much from the fact that they would only have to pay one-fifth cash. There was no selling in 1878. We could not sell anything.

Redirect examination:

The city didn't sell any ground-rent lots in 1878. I was an assessor at the time the city assessed ground-rent lots for taxes; they were not reduced in value because there was any ground rent due, but were assessed the same as the other lots. They were all taxed alike.

Recross-examination:

They were taxed at what the property would bring on the market. We did not consider what the ground rent was. All lots were put down alike.

Be it further remembered that after the plaintiffs had submitted their evidence and had announced that they rested their case,
85 the defendant submitted an oral motion for a nonsuit and after argument had the judge of said court sustained said motion and rendered judgment granting nonsuit and dismissing the petition of the plaintiffs, to which said judgment the said plaintiffs then and there excepted and now except and assign error thereon and plainly and specifically set forth the errors complained to have been committed.

First. That the said judge erred in granting the said nonsuit and dismissing said petition.

Second. That the said judge erred in refusing to submit said cause to the jury upon the evidence with the following instructions

of law applicable to the case submitted in writing during the argument of said cause and directing such verdict as was demanded, to wit:

(*a.*) That in the sale of the lots laid out by the subdivision of the town common the purchaser had the choice of purchasing the absolute fee in said lot, or take a less estate. In the latter case the purchaser had the use and occupation of the premises secured to him and his assigns so long as the valuation money remained unpaid, on the payment of a specific ground rent to the mayor and aldermen.

(*b.*) The estate of the purchaser created by the contract was not an estate of freehold, but an estate for years, the fee remained in the corporation and the right to the use and occupation on specific ground rent accrued to the grantee.

(*c.*) Where by deed realty is conveyed to one and his executors, administrators and assigns to have and to hold with all the advantages thereof, peaceably and quietly to have, hold, use, occupy, possess and enjoy the same and receive and take the rents, issues and profits to his own use absolutely without let, suit, trouble, eviction or denial of the grantor with the right of re-entry for the non-payment of the rent reserved, the relation of landlord and tenant is established. The grantor does not part with the title, he surrenders only the use and occupation of the premises in consideration of the payment of the annual ground rent. And no reconveyance or judgment of ouster is requisite to divest the tenant of any title, but the grantor re-enters in case of default in payment of the rent reserved, to divest the tenant of the possession of the use.

(*d.*) The ordinances and the deed, the published notice of the sale and the announcements made at the sales construed together constitute the contract between the city of Savannah and the purchaser by which the city retained the fee-simple title to the lot and the purchaser obtained the right to the lot and the purchaser obtained the right to the use and occupation of the lot so long
86 as he faithfully paid the annual ground rent in quarterly payments, and his right to the use and occupation to cease in case of default in the payment of the said rent reserved for the space of fifteen or twenty days free from any other charge or tax on the said lot to be imposed by the mayor and aldermen.

(*e.*) The covenant of the quiet enjoyment was expressly conditioned upon the payment of the ground rent at the time and after the manner provided in the contract, and upon the faithful performance of this condition, viz: the payment of the said ground rent at the time and in the manner provided in the contract the city could not determine the said use and occupation, nor could the city increase the amount required to be paid under the name of taxes or any other charge.

(*f.*) The absolute title being reserved to the city and the use and occupation being granted to the purchaser on the specific terms of this contract, the mayor and aldermen could not change the terms of said contract and require from the purchaser any other or fur-

ther sum than the payment of the said ground rent at the times and in the manner prescribed therein.

(*g.*) The imposition of a tax by the city of Savannah on the holders of these ground-rent lots in addition to the ground rent reserved, was a violation of this contract by increasing the annual payments beyond the amount specified in the contract.

(*h.*) The construction placed upon the contract by the parties as shown by the evidence of this intention thereto and acted on by them so long as the grantor continued to make such contracts is binding on the parties and is not within the power of the municipal corporation to change the construction of these contracts as declared and acted on by it, after it had ceased to make contracts of this character and nature.

(*i.*) The municipal corporation of Savannah after asserting and declaring the said contracts for the use and occupation of ground-rent lots to be leases and the estate a leasehold estate, for seventy years and until it had determined not to dispose of any more of its domain on such terms, it is now estopped from denying that said contracts are leases.

(*j.*) The municipal corporation having determined that said ground-rent lots were not subject to taxation in the first ordinances, assessing and levying a tax on real estate in the corporate limits and having sold the greater portion of said ground-rent lots while said declaration of the municipal authorities was in minutes, ordinances, reports and official records and regularly announced
87 at sales of said lots, it is estopped from now asserting the right to levy any municipal tax upon the same, especially after it had ceased to dispose of its domain on the ground-rent plan.

(*k.*) The municipal corporation *have* asserted its ownership of the title to said ground-rent lots, in its official report, by the official entries on its minutes and publication of the claim openly and notoriously are estopped now from disclaiming such ownership and title for the purpose of imposing a tax on the lessees thereof.

(*m.*) Under the terms of the contract the only indebtedness enforcible by the corporation against the holders of said lots is the annual ground rents as they accrue in quarterly payments. The valuation money was never demandable, the corporation kept the title so long as the tenant retained the valuation money.

(*n.*) The obligation imposed by the contract contained in the ordinances and conveyance upon the holders of ground-rent lots so far as the municipal corporation is concerned is to annually pay into the city treasury in four quarterly payments the ground rent reserved to be paid, no other payments to the city are contracted for. And the obligation assumed by the municipal corporation upon the payment of the said ground rent in the manner directed the holders of said lots shall at all times thereafter peaceably and quietly have, hold, use, occupy, possess and enjoy the said lot and premises and receive and take the rents, issues and profits thereof and of every part thereof without the let, suit, trouble, eviction or denial of the said corporation or any person whatsoever acting under them or by virtue of their authority, and the subsequent

imposition by said municipal corporation of a tax on said lots in addition to said rents is a violation of the obligation of said contract.

(*o.*) That the municipal authorities did not assume to bear any assessment- or burdens that should be in common with other lot-holders, but such assessments and burdens should be borne by the tenant, but such assessments and burdens should not be for the benefit of the said municipal corporation, but for the use or benefit of the lot-holders in common for sidewalks or other betterments.

(*p.*) To change the relation from tenant paying annual ground rent to that of owner of the fee or absolute estate the holder of a ground-rent lot, if so inclined, was required to pay the valuation or purchase-money with what rent was due or unpaid at the time no other charge-, such as taxes or other dues to the municipal corporation, are required to be paid, and until such voluntary pay-
88 ment the fee-simple title remained in the city of Savannah, and the corporation could not levy and collect a tax on its own property.

(*q.*) The payment of the valuation money could not be directly or indirectly enforced or coerced by making the hold*ing* of said ground-rent lots mere owners by any act or ordinance of the city, such as the imposition of taxes on the lot in addition to the ground rent.

(*r.*) That the said contract made by the municipal authorities with the holders of said lots assured to said holders not only the use and occupation of the said lots forever so long as the ground rent should be paid, but also all and singular the advantages thereunto belonging, which advantages were the privilege of purchase of the lot at a fixed price, and the freedom from any other charges by the municipal corporation, and the right to receive and take the rents, issues, and profits thereof and every part thereof to their own use absolutely without any let, suit, trouble, eviction, or denial of the said corporation. And the assessment and levy of a tax upon said lots in addition to said annual rental by the municipal corporation is a violation of the obligations of said contract by the said municipal corporation.

That the city of Savannah is the holder of the absolute title to the said lots and that the holders thereof have only the use and occupation of the same, subject to the payment of an annual rent. And the city of Savannah being the owner of the fee, cannot levy and assess a tax upon the said lots and require the holders thereof to pay the same as if they were the holders of the fee.

The court erred in granting a nonsuit, but should have instructed the jury according to the principles above set forth, and directed a verdict for the plaintiff-.

That the court erred in excluding the following evidence of the witness, Alfred Haywood, which evidence was as follows: "The relation between the city and holders of these ground-rent lots were much those of landlord and tenant. So I considered them. The interest or title the city has claimed to have in said lots was a fee-simple interest." The said evidence being relevant and perti-

nent to the issues on trial as to the understanding of parties to the contract.

That the judge erred in granting the said nonsuit and dismissing said petition in all and every of the grounds contained in the statement of the law and the evidence as hereinbefore set forth.

That the judge erred in rendering said judgment whereby the said plaintiffs were deprived of the protection of the law and
89 denied their constitutional rights of protection against the impairment of the contract made by the said defendant, the municipal corporation, by increasing under the name of taxes the annual payments originally required to be paid to maintain and secure the use, occupation, and enjoyment of the property conveyed to said plaintiffs.

And now on the 6th day of June, A. D. 1898, within sixty days from the judgment rendered, and within thirty days from the adjournment of the court, the said plaintiffs tender this their bill of exceptions, and pray that the same may be signed and certified in terms of the law, that the errors complained of may be considered and corrected.

And the said plaintiffs specify as material to a clear understanding of the errors complained in connection with the evidence herein incorporated the following portions of the record:

1. The petition as amended, and the exhibits thereto.
2. The answer of the defendants and the exhibit thereto.
3. The judgment of the court granting the nonsuit and dismissing said cause.

SAUSSY & SAUSSY,
Solicitors for Petitioners.

Post-office address: Savannah, Ga.

I do certify that the foregoing bill of exceptions is true and contains all the evidence and specifies all of the record material to a clear understanding of the errors complained of, and the clerk of the superior court of Chatham county is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such and cause the same to be transmitted to the October term next of the supreme court that the errors alleged to have been committed may be considered and corrected.

Sav'h, Ga., June 6, 1898.

R. FALLIGANT,
Judge E. J. C., Geo.

90 GEORGIA, }
Chatham County. }

Clerk's office, superior court.

I, James K. P. Carr, clerk of said superior court, do hereby certify this instrument in printing and writing to be the true original bill of exceptions filed in this office in the case of David Wells *et al. versus* The Mayor and Aldermen of the City of Savannah *et al.*, in

equity, a copy of which bill of exceptions remains on file in this office.

In testimony whereof I have hereunto set my official signature and affixed the seal of said superior court, at Savannah, this 14th day of June, 1898.

[Seal of the Superior Court of Chatham County, Georgia.]

JAMES K. P. CARR,
Clerk S. C. C. C.

91 Clerk's office, supreme court of Georgia.

ATLANTA, *March* 5, 1900.

I hereby certify that the foregoing pages hereto attached contain a true copy of the bill of exceptions in the case therein stated, as appears from the original now of file in this office.

Witness my signature and the seal of said court, hereto affixed the day and year last above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON, *Clerk.*

92 WELLS ET AL.
v.
MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH ET AL.

By the COURT:

1. Even if the municipal authorities of any city in this State had, prior to the constitution of 1877, the power by contract with any of its citizens to perpetually exempt property from taxation, before a claim to such an exemption could be seriously entertained the existence of such a contract would have to be clearly and specifically shown. The record in this case fails to disclose any contract between the city of Savannah and the plaintiffs or any of their predecessors in title to the land claimed to be exempt from municipal taxation. Such a contract will not be implied merely from the fact that the marshal of the city customarily announced, when lands of like character were exposed for public sale, that the same were not subject to city taxes, nor from the fact that it was generally understood by the public that such property would be so exempt, nor from the further fact that for many years the city never undertook to exercise over this class of property its powers of taxation.
2. All other questions presented by the record in this case were specifically adjudicated by this court in its decision therein as reported in 87 Ga., 397.

93 LEWIS, *Justice:*

Over a hundred years ago the municipal authorities of the city of Savannah, by ordinances duly passed, resolved to expose to public sale certain lands known as "commons," then owned by the city.

One scheme provided for in these ordinances was to offer the lands for sale on what was known as the "ground-rent plan." The purchaser who elected to buy upon this plan was to pay quarterly a stipulated amount as rent for the land sold to him, and as long as such payments were continued he was to have the right of peaceful occupation and use of the premises forever. It is this class of property, now held by the successors in title to the original purchasers from the city, that the plaintiffs claim to be exempt from municipal taxation. There are two controlling questions presented by the record: First, have the plaintiffs such an interest in the title to the property as will subject them to the payment of taxes thereof? Second, has this property ever been perpetually exempted from the assessment of municipal taxes by virtue of any contract between the city and the original purchasers therefrom?

The first of these questions was specifically adjudicated adversely to the plaintiffs in error when this case was before this court at the March term, 1891—87 Ga., 397. We think the decision then rendered also disposed of the second question above mentioned, it being necessarily involved in the case; but, inasmuch as this court did not enter upon a specific discussion as to the contractual relations which the plaintiffs claim exist between themselves and the city of Savannah, and as their learned counsel in his argument before us insisted that at the last hearing of the case in the court below much additional evidence was introduced which strengthened his position that the city had by express contract exempted this property from taxation, we will briefly present the views which we entertain concerning this issue.

94 We are aware of no act passed by the State legislature that has ever conferred upon the city of Savannah the power to exempt from taxation any property owned by its citizens. There is respectable and weighty authority to the effect that a legislative body in the exercise of the sovereign powers of a State has no inherent right upon any consideration to enact a law perpetually exempting any particular species of property from the burden of taxation. Some of the decisions to which we refer are based upon the reasoning that from the very nature of legislative bodies one legislature cannot fix a limit to the power of another and subsequent one. Other authorities have treated such exemptions by legislative enactment as privileges or bounties only, revocable at the will of the legislature. It is unimportant, however, to go into a consideration of the many judicial expressions of opinion to be found upon this subject, among which may be cited the remarks of McCay, J., in State of Georgia *v.* Georgia Railroad & Banking Co., 54 Ga., 424, and the discussion of the question by Judge Bleckley in Atlantic & Gulf R. R. Co. *v.* State of Georgia, 55 Ga., 312. The Federal Supreme Court seems thoroughly committed to the proposition that a State is bound by an act of its legislature which for a good or valuable consideration perpetually exempts any particular class of property from taxation. In the case of Murray *v.* Charleston, 96 U. S., 432, it was held that the clause in the Constitution of the United States providing that "no State shall pass a law impairing the obli-

gation of contracts is a limitation upon the taxing power of a State, as well as upon all its legislation, whatever form it may assume.' See also Central Railroad & Banking Co. *v.* Georgia, 92 U. S, 665; Salt Company *v.* East Saginaw, 13 Wall., 376; State of New Jersey *v.* Wilson, 7 Cranch, 164; Cooley on Taxation, p. 66.

95 In the view we take of this case we find it unnecessary to pass upon the power of a State government or of its subordinate branches to enact such legislation or make such contracts with its citizens. We think there can be no sort of question that when such an exemption is claimed by any citizen of the government, it is incumbent upon him to clearly show the existence of an express contract, unambiguous and definite in creating by its terms the exemption claimed. Such a contract cannot be implied, and if there is any doubt concerning its existence or the exact and true meaning of its stipulations, the doubt ought always to be resolved in favor of the government upon which has been conferred the right to exercise this sovereign power. In this connection we quote the following pertinent extract from the opinion of Mr. Justice Swayne in the case of Tucker *v.* Ferguson, 22 Wall., 575, as laying down the correct rule upon this subject: "The taxing power is vital to the functions of government. It helps to sustain the social compact and to give it efficacy. It is intended to promote the general welfare; it reaches the interests of every member of the community; it may be restrained by contract in special cases for the public good, where such contracts are not forbidden; but the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists it is to be rigidly scrutinized and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right and narrows a trust created for the good of all."

Was such a contract shown in the present case? With the view of determining whether or not there was, we have naturally looked to the official action taken by the governing body of the city, either in its ordinances or resolutions providing for the plan upon which

96 the sales were to be made and the consequences and effect thereof, or in its deed of conveyance to the purchaser. Upon examining the various ordinances set out in the record we fail to find any reference whatever to the matter of exempting this property from taxation, and instead of finding any stipulation to that effect in the form of deed invariably made by the city to the various purchasers, there appears a clause directly negativing the idea that the city ever intended to grant a perpetual exemption of this property from the burden of taxation. In each instance it was recited in the deed given to the purchaser that the conveyance of the city was made and the rights of the purchaser thereunder were conferred "subject only to such assessments and burthens as shall be in common with other lot-holders in the said city." The term "assessment" is often used as a synonym of "taxes." Indeed, one of the definitions of this term given by Webster is "a tax." But even if this word, as used in the deed, does not necessarily refer to taxation,

the word "burthen," which is also therein employed, is certainly sufficiently comprehensive to include municipal taxes. Taken all together, the language adopted is clearly broad enough to embrace every burden then existing or which might thereafter be lawfully imposed upon other land-owners in the city. The deed was signed by both parties. Here, then, is a specific written agreement made between the parties to the contract relating to the sale of property by the city, whereby it is expressly declared that the property shall be held by the purchaser (and, of course, by his assigns) subject to any burden which might be borne in common by the holders of other lots in the city, necessarily including that of municipal taxation.

Plaintiffs in error contend, however, that the contract they insist upon is evidenced sufficiently by the conduct of the munici-
97 pal officers at the time the sales by the city took place. It was shown that when lots were put up for sale the city marshal publicly announced that they would not be subject to city taxes; that this was generally understood by the city at large, and that for nearly a hundred years after these sales first began the municipal authorities failed to tax the lands, and in various ordinances afterwards passed these ground-rent lands were exempted. The effect of these ordinances was merely to grant an exemption from taxes for the particular years to which they related. Mere non-user by a government of its power to levy a tax, it matters not for how long it continued, can never be construed into a forfeiture of the power. This question was directly passed upon by this court when the case was here before. As to this point, Chief Justice Bleckley said: "Whatever the expectation of purchasers or the unbroken practice of the city hitherto may have been, the mandate of the constitution of 1877 is to tax all property, save that expressly exempted by the legislature under constitutional authority, if any is taxed. That this mandate may have heretofore been disregarded is no reason why it should not be obeyed now."

There is an absolute want of any testimony in the record showing that the mayor and aldermen of the city of Savannah, by ordinance, resolution, or official action of any sort, ever authorized the marshal to make the public announcement above referred to in offering for sale the city's property. The effort to create a contract by such proof is simply an attempt to engraft upon a written instrument by parol a stipulation contrary to the terms of the writing itself. After the oral announcement made by the marshal, the city made its deed to the purchaser, the terms of which expressly negatived the assurance given by that officer to the public. Under no rule of law could such parol evidence be allowed to vary the terms of a written con-
tract. Besides all this, we fail to find in the record any tes-
98 timony showing that these particular plaintiffs or any of their predecessors in title bought any of the lots in question under the impression that the same would be exempt from taxes. Indeed, it is not shown that any of these lots were purchased at a sale at which the marshal made such an announcement as that above referred to. The evidence simply goes to the extent of show-

ing what was his custom in this particular and what was the general impression of the public in regard to the matter. For aught that appears, those who actually bought at these sales were fully advised as to the truth with reference thereto, if not prior to the sale, at least before they complied with their bids and accepted the city's conveyance of the lots purchased by them.

Our conclusion therefore is that even if the city of Savannah had the power claimed for it, the record utterly fails to make it appear that its authorities ever attempted to exercise such power.

Judgment affirmed, all the justices consurring.

99 Clerk's office, supreme court of Georgia.

ATLANTA, *March* 5, 1900.

I hereby certify that the foregoing is a true copy of the decision and opinion of the supreme court of Georgia in the case therein stated, as appears from the originals now of file in this office.

Witness my signature and the seal of said court, hereto affixed the day and year last above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON,
Clerk of the Supreme Court of Georgia.

100 Supreme Court of the State of Georgia.

ATLANTA, GA., *March* 17, 1899.

The honorable supreme court met pursuant to adjournment. The following judgment was rendered:

DAVID WELLS ET AL.
versus
MAYOR, ETC., OF SAVANNAH ET AL.

This case came before this court upon a writ of error from the superior court of Chatham county, and after argument had it is considered and adjudged that the judgment of the court below be affirmed.

All the justices concurring.

Bill of costs, $10.00.

Supreme Court of the State of Georgia.

CLERK'S OFFICE, ATLANTA, *March* 5, 1900.

Seal Supreme Court of the State of Georgia, 1845.

I certify that the above is a true extract from the minutes of the supreme court of Georgia, and that J. R. Saussy paid the above bill of costs.

Witness my signature and the seal of said court affixed the day and year last above written.

Z. D. HARRISON, *Clerk.*

101 CLERK'S OFFICE, SUPREME COURT OF GEORGIA,
ATLANTA, *March* 5, 1900.

I hereby certify that the foregoing and attached pages contain a true copy of the entire record in the case of David Wells, Thomas Ballantyne, Charles M. Gilbert and John H. Gilbert, Wm. Kehoe, Henry Blun, Daniel G. Purse, Rob't McIntire, Mary E. Douglass, and Dennis O'Connell, plaintiffs in error, *v.* Mayor and Aldermen of the City of Savannah and Rob't J. Wade, city marshal, defendants in error, the same being #7 of the eastern circuit, October term, 1898, of said supreme court, as appears from the records and files of said court.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON,
Clerk of the Supreme Court of Georgia.

102 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Georgia, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between David Wells, Thomas Ballantyne, Charles M. Gilbert and John H. Gilbert, William Kehoe, Henry Blun, Daniel G. Purse, Robert McIntyre, Mary E Douglass, and Dennis O'Connell, plaintiffs, and The Mayor and Aldermen of the City of Savannah and Robert J. Wade, city marshal, defendants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or
103 wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said David Wells, Thomas Ballantyne, Charles M. Gilbert, John H. Gilbert, William Kehoe, Henry Blun, Daniel G. Purse, Robert McIntyre, Mary E. Douglass, and Dennis O'Connell, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and

proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of February, in the year of our Lord one thousand nine hundred.

Seal U. S. Circuit Court, N. D. Georgia.

O. C. FULLER,
Clerk of the Circuit Court of the United States for the Northern District of Georgia.

Allowed by—
T. J. SIMMONS,
Chief Justice Supreme Court of Georgia.

Filed in office Febr'y 13th, 1900.

Z. D. HARRISON.
Clerk S. C. Ga.

104 UNITED STATES OF AMERICA, *ss:*

To the Mayor and Aldermen of the City of Savannah and Robert J. Wade, city marshal, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Georgia, wherein David Wells, Thomas Ballantyne, Charles M. Gilbert, John H. Gilbert, William Kehoe, Henry Blun, Daniel G. Purse, Robert McIntyre, Mary E. Douglass, and Dennis O'Connell are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thos. J. Simmons, chief justice of the supreme court of the State of Georgia, this eighth day of February, in the year of our Lord one thousand nine hundred.

T. J. SIMMONS,
Chief Justice Supreme Court of Georgia.

105 Due and legal service of the within citation acknowledged this twelfth day of February, 1900.

SAM'L B. ADAMS,
Att'y for The Mayor and Aldermen of the City of Savannah & Robert J. Wade, City Marshal, the Def'ts.

Filed in office Feb'y 13, 1900.

Z. D. HARRISON,
Cl'k S. C. Ga.

106 In the Supreme Court of the State of Georgia.

DAVID WELLS, THOMAS BALLANTYNE, CHARLES M. Gilbert and John H. Gilbert, William Kehoe, Henry Blun, Daniel G. Purse, Robert McIntyre, Mary E. Douglass, and Dennis O'Connell	In Equity.
v.	
THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH and Robert J. Wade, City Marshal.	

To the Honorable Thomas J. Simmons, chief justice of the supreme court of the State of Georgia:

Your petitioners, David Wells, Thomas Ballantyne, Charles M. Gilbert and John H. Gilbert, William Kehoe, Henry Blun, Daniel G. Purse, Robert McIntyre, Mary E. Douglass, and Dennis O'Connell, respectfully show that on the seventeenth day of March, A. D. 1899, the supreme court of the State of Georgia entered a judgment in a case in which your petitioners were appellants and The Mayor and Aldermen of the City of Savannah, a municipal corporation, and Robert J. Wade, city marshal, were appellees.

That said supreme court of the State of Georgia is the highest court of the State of Georgia in which a decision in said suit could be had, and that said judgment so rendered was against your petitioners and was a final judgment in said cause.

That in said judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of your petitioners, all of which will more in detail appear from the assignment of errors which is filed with this petition.

107 That said suit and the judgment of the supreme court of the State of Georgia drew in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or therein was drawn in question the validity of a statute or ordinance of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, *that* the decision was in favor of such their validity, or therein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, and therein a manifest error hath happened, to the damage and prejudice of your petitioners.

Wherefore your petitioners pray for an allowance of a writ of error in this behalf from the Supreme Court of the United States to the supreme court of the State of Georgia for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

JOACHIM R. SAUSSY,
POPE BARROW,
Attorneys for Plaintiffs in Error.

Filed in office February 13, 1900.

Z. D. HARRISON,
Clerk S. C. Ga.

108 In the Supreme Court of the State of Georgia.

DAVID WELLS, THOMAS BALLANTYNE, CHARLES M. Gilbert and John H. Gilbert, William Kehoe, Henry Blun, Daniel G. Purse, Robert McIntyre, Mary E. Douglass, and Dennis O'Connell
v.
THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH and Robert J. Wade, City Marshal.
} In Equity.

This 8 day of February, A. D. 1900, came the plaintiffs, by their attorneys, and filed herein and presented to this court their petition praying for the allowance of a writ of error from the Supreme Court of the United States to the supreme court of the State of Georgia, intended to be urged by them, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, this court, being the court rendering the judgment or passing the decree complained of, does allow the writ of error upon the plaintiffs giving bond according to law in the sum of two hundred and fifty dollars.

In witness whereof this order, allowing said writ of error, is signed by Thomas J. Simmons, chief justice of the said supreme court of the State of Georgia, this 8 day of February, in the year of our Lord nineteen hundred.

T. J. SIMMONS,
Chief Justice Supreme Court of Georgia.

Filed in office February 13, 1900.

Z. D. HARRISON,
Clerk S. C. Ga.

109 Know all men by these presents that we, David Wells, Thomas Ballantyne, Charles M. Guilbert, William Kehoe, Henry Blun, and Daniel G. Purse, as principals, and David Y. Dancy, as surety, are held and firmly bound unto the Mayor and Aldermen of the City of Savannah and Robert J. Wade, city marshal, in the full and just sum of two hundred and fifty dollars, to be paid to the said The Mayor and Aldermen of the City of Savannah and Robert J. Wade, city marshal, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of February, in the year of our Lord one thousand nine hundred (1900).

Whereas lately, at a term of the supreme court of the State of

Georgia, in a suit depending in said court between David Wells, Thomas Ballantyne, Charles M. Guilbert, John H. Guilbert, William Kehoe, Henry Blun, Daniel G. Purse, Robert McIntyre, Mary E. Douglass, and Dennis O'Connell, plaintiffs, and The Mayor and Aldermen of the City of Savannah and Robert J. Wade, city marshall, defendants, a judgment was rendered against the said David Wells, Thomas Ballantyne, Charles M. Guilbert, John H. Guilbert, William Kehoe, Henry Blun, Daniel G. Purse, Robert McIntyre, Mary E. Douglass, and Dennis O'Connell, and the said David Wells, Thomas Ballantyne, Charles M. Guilbert, John H. Guilbert, William Kehoe, Henry Blun, Daniel G. Purse, Robert McIntyre, Mary E. Douglass, and Dennis O'Connell having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Mayor and Aldermen of the City of Savannah and Robert J. Wade, city marshal, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said David Wells, Thomas Ballantyne, Charles M. Guilbert, John H. Guilbert, William Kehoe, Henry Blun, Daniel G. Purse, Robert McIntyre, Mary E. Douglass, and Dennis O'Connell shall prosecute the writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

DAVID WELLS.	[SEAL.]
THOMAS BALLANTINE.	[SEAL.]
CHAS. M. GILBERT.	[SEAL.]
WM. KEHOE.	[SEAL.]
HENRY BLUN.	[SEAL.]
D. G. PURSE.	[SEAL.]
D. Y. DANCY.	[SEAL.]

Sealed and delivered in presence of—

WILLIAM F. CONSTANTINE,
[SEAL.] *Notary Public, Chatham County, Georgia.*

Approved by—

T. J. SIMMONS,
Chief Justice of the Supreme Court of the State of Georgia.

Filed in office Feb'y 13th, 1900.

Z. D. HARRISON,
Clk S. C. Ga.

110 In the Supreme Court of the United States.

DAVID WELLS, THOMAS BALLANTYNE, Charles M. Gilbert, John H. Gilbert, William Kehoe, Henry Blun, Daniel G. Purse, Robert McIntyre, Mary E. Douglass, and Dennis O'Connell, Plaintiffs in Error, *v.* THE MAYOR AND ALDERMEN OF THE City of Savannah and Robert J. Wade, City Marshal*l*, Defendants in Error.	Error to the Supreme Court of the State of Georgia.

Assignment of Error.

1. The supreme court of Georgia erred in that its finding and judgment are contrary to law.

2. The supreme court of Georgia erred in that its findings are contrary to the evidence.

3. The supreme court of Georgia erred in affirming the judgment of the superior court of Chatham county, Georgia

4. The supreme court of Georgia erred in holding that the record of the case failed to disclose any contract between the said mayor and aldermen of the city of Savannah and the said plaintiffs, or any of their predecessors in title to the land claimed to be exempt from municipal taxation.

4. The supreme court of Georgia erred in holding in affirmation of a former decision of the court upon the hearing of a writ of error from a refusal of a temporary injunction that under the terms of sale of the lots of land under the ground-rent plan the mayor and aldermen of the city of Savannah parted with their title to the premises and had not an iota of interest in the said lots of land so sold.

110½ 6. The supreme court of Georgia erred in holding that under the ordinance and conveyances of the mayor and aldermen of the city of Savannah the reservation of the rents and the covenants of quiet enjoyment in the conveyances under which plaintiffs and those under whom they claimed did not prohibit the mayor and aldermen from imposing any other charges or payments to it in the holders of said lots of land under the name of taxes or any other charges.

7. The supreme court of Georgia erred in sustaining the judgment of the superior court of Chatham county, Georgia, dismissing complainants' bill of complaint under the pleadings and evidence that the contract made by the municipal corporation did not prevent the mayor and aldermen of the city of Savannah from imposing on the said lots of land a tax in addition to the ground rent reserved in the original lease.

8. The supreme court of Georgia erred in holding that the case failed to disclose any contract between the mayor and aldermen of

the city of Savannah and the plaintiffs or any of their predecessors in title to the land claimed to be exempt from municipal taxation, when the evidence showed that the estate conveyed was a leasehold interest, with a certain rent reserved and an express covenant of quiet enjoyment based upon the payment of said rent reserved and without any reservation of any power in the municipal corporation to increase the redendum in any manner.

9. The supreme court of the State of Georgia erred in finding that the terms of sale as contained in the public notices and announcements, the covenants in the conveyances, and the ordinances of the city passed consecutively for seventy years exempting the said ground-rent lots from city taxation did not amount to an express contract, and could be violated by the municipal authorities at their pleasure.

111 10. The supreme court of the State of Georgia erred in refusing to adjudge that under the evidence submitted the absolute title to the premises occupied and held by the plaintiffs in error was in the mayor and aldermen of the city of Savannah, who by their covenant of quiet enjoyment contracted with the plaintiffs in error and those under whom they claimed that they should have and enjoy the said premises, with all the advantages thereof, without let, suit, eviction, or denial of the grantor, upon the payment of the said rent reserved, and the said mayor and aldermen could not change the terms of said contract or violate said covenant by increasing the annual payments to be made to it by the said plaintiffs in error in the name and under the guise of taxes upon said lots so granted.

11. The supreme court of the State of Georgia erred in refusing to adjudge and decree that the mayor and aldermen of the city of Savannah, having asserted its ownership and title to the said ground-rent lots in its official reports by its official entries on its minutes and having by its ordinances and announcements and official declarations openly admitted that the said ground-rent lots were not subject to municipal taxation, were estopped from disclaiming such ownership and from attempting to impose such taxation upon such lots.

12. The supreme court of the State of Georgia erred in refusing to adjudge and decree under the evidence submitted in the record that the obligations imposed by the contract contained in the ordinances, conveyances, and announcements made at the sales imposed on the plaintiffs in error and those holding ground-rent lots, so far as the municipal corporation is concerned, the duty to pay annually into the city treasury in four quarterly payments the ground rent reserved to be paid, and that the obligation imposed on the mayor and aldermen of said city, the defendants in error, was to
112 secure to the holders of said ground-rent lots the peaceable and quiet use, occupation, and enjoyment of said lots, to take the rents, issues, and profits thereof and of every part thereof without let, suit, eviction, or denial of said mayor and aldermen or any person acting under them or by their authority on the payment of said ground rent in the manner directed, and that the subsequent

imposition by the said mayor and aldermen of a municipal tax on said lots in addition to said ground rent was a violation of said obligation of said contract.

13. The supreme court of the State of Georgia erred in refusing to hold that under the evidence submitted the relation created between the mayor and aldermen of the city of Savannah and the holders of these ground-rent lots precluded the said mayor and aldermen from imposing any tax upon the lot-, the same continuing the property of said mayor and aldermen until the purchase-money should be paid.

14. The supreme court of the State of Georgia erred in disregarding the undisputed evidence that, while the said mayor and aldermen levied and collected a tax upon the improvements erected on said ground-rent lots by the holders thereof, they observed the contract of quiet enjoyment in the conveyance, and the agreement announced at the time the said lots were disposed of that said lots should be free from city taxes, and by express ordinances declared the same exempt from city taxes and did exempt the same from the time of the first sale of said lots, in 1791, to the year 1890.

15. That the supreme court of the State of Georgia erred in refusing to recognize the difference between the liability of the holders of said lots to taxation by the State on their interest in said lots and their liability to the mayor and aldermen only for ground
113 rent and not for city taxes so long as the lots were held under the terms of the original lease or conveyance.

16. That the supreme court of the State of Georgia erred in refusing to adjudge that under the evidence the said municipal corporation is the holder of the absolute title in fee to the said lots, and that the holders had only the use and occupation of the same so long as they paid the rent reserved, and that the said municipal corporation, being the owner in fee, cannot levy and assess a tax on their own property and require the holders thereof to pay the same, in addition to the said rent reserved.

17. That the supreme court of Georgia erred in refusing to adjudge that the imposition by the mayor and aldermen of the city of Savannah of a tax on these ground-rent lots, in addition to the rent reserved, was a violation of the contract, which reserved only a certain rent, whereby the city increased the annual payment to it on these lots beyond the amount specified in the contract.

18. That the supreme court of Georgia erred in refusing to adjudge that the said contract made by the municipal authorities with the holders of said ground-rent lots assured to said holders not only the use and occupation of said lots forever, so long as the ground rent should be paid, but also all and singular the advantages thereunto belonging, which advantages were the privilege of the purchase of the lot at a fixed price and the freedom from any other charges by the municipal corporation, and the right to receive and take the rents, issues, and profits of said lots without any let, suit, trouble, eviction, or denial of the said corporation, on the payment of a fixed annual rent only, and that the assessment and levy of a

tax on said lots, in addition to said annual rent by said municipal corporation, was a violation of the obligations of said contract.

114 19. That the supreme court of the State of Georgia erred in rendering said judgment, whereby the said plaintiffs were deprived of the protection of the law and denied their constitutional rights of protection against the impairment of the contract made by the said defendant, the municipal corporation, by increasing under the name of taxes the annual payments originally required to be paid to maintain and secure the use, occupation, and enjoyment of the property conveyed to said plaintiffs.

20. That the supreme court of Georgia erred in that its decision in this case is in favor of the validity of an ordinance or law passed by the mayor and aldermen of the city of Savannah which impairs the obligation of a prior contract made by said mayor and aldermen and violates the constitutional rights of the plaintiffs in error secured in and by said contract.

JOACHIM R. SAUSSY,
POPE BARROW,
Attorneys for Plaintiffs in Error.

Filed in office February 13, 1900.
Z. D. HARRISON,
Clerk S. C. Ga.

115 Clerk's office, supreme court of Georgia.

ATLANTA, *March* 5, 1900.

I hereby certify that the foregoing pages hereto attached contain the original writ of error and original citations in the case of David Wells *et al.*, plaintiffs in error, *v.* Mayor and Aldermen of the City of Savannah *et al.*, defendants in error, together with a true and complete copy of the record and proceedings had in said case in the supreme court of the State of Georgia, as appears from the records and files of this office.

Witness my signature and the seal of said court, hereto affixed the day and year last above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON,
Clerk of the Supreme Court of Georgia.

Endorsed on cover: File No., 17,669. Georgia supreme court. Term No., 222. David Wells, Thomas Ballantyne, Charles M. Gilbert, John H. Gilbert, William Kehoe, Henry Blun, Daniel G. Purse, Robert McIntyre, Mary E. Douglass, and Dennis O'Connell, plaintiffs in error, *vs.* The Mayor and Aldermen of the City of Savannah and Robert J. Wade, city marshal. Filed March 10th, 1900.

No. 222.

FILED
OCT 16 1900
JAMES H. McKENNEY,
Clerk.

Br. of Saussy & Barrow for

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Oct. 16, 1900.

No. 222.

DAVID WELLS, THOMAS BALLANTYNE, CHARLES M. GILBERT, JOHN H. GILBERT, WILLIAM KEHOE, HENRY BLUN, DANIEL G. PURSE, ROBERT McINTYRE, MARY E. DOUGLASS, AND DENNIS O'CONNELL, PLAINTIFFS IN ERROR,

against

THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH AND ROBERT J. WADE, CITY MARSHAL.

BRIEF FOR PLAINTIFFS IN ERROR.

JOACHIM R. SAUSSY,
POPE BARROW,
Counsel for Plaintiffs in Error, Savannah, Georgia.

(17,669.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10-15-1900

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 222.

DAVID WELLS, THOMAS BALLANTYNE, CHARLES M. GILBERT, JOHN H. GILBERT, WILLIAM KEHOE, HENRY BLUN, DANIEL G. PURSE, ROBERT McINTIRE, MARY E. DOUGLASS, AND DENNIS O'CONNELL, PLAINTIFFS IN ERROR,

against

THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH AND ROBERT J. WADE, CITY MARSHAL, DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

In May, 1790, the yearly expenses of the city government of the city of Savannah were estimated to be 1,250 pounds sterling, and the income of the city about 542 pounds sterling, a deficiency of 708 pounds sterling. (See Record, p. 26.)

At this time there was a large body of land on the east, south, and west of the city proper called the "Town com-

mon," the title to which was believed to be vested in the lot-owners of the town. The town council, after consulting with the lot-holders of the city, determined to lay off a certain portion of the East and West common into town lots and to dispose of them, with a view of relieving the inhabitants from burdensome assessments and for the purpose of defraying the necessary expenses of the current year, "*as well as establishing a fund for that purpose in future.*" (See Record, p. 26.) and passed an ordinance on Sept. 28

Eighty lots were laid off from the East common and forty lots from the West common, 120 lots in all, with squares, streets, and lanes, and the terms and conditions of disposing of these lots were, *first*, to value the lots at from 160 pounds sterling to 40 pounds sterling and to fix a ground rent on the same at the rate of five pounds per cent., and the purchaser could either pay down the valuation money or hold the purchase on a ground rent payable quarterly. *Second.* They were to be put up at public auction, beginning with No. 1 in each ward, and be disposed of as long as there were bidders. They were to be set up at the valuation fixed, and whatever sum of money should be bid in addition to the valuation money should be considered as increase money and be paid down in cash, and the highest bidder of increase money should be deemed the purchaser of the lot then offered. *Third.* The purchaser had the option either to pay the valuation money in cash and obtain a deed in fee-simple (see Record, p. 28) or retain the valuation money in their hands and the hands of their heirs and assigns forever on a ground rent at the rate of 5 per cent., payable in four equal quarterly payments into the city treasury (Record, p. 29).

The estate which the purchaser acquired in electing to

retain the valuation money in his hands was declared to amount to this:

"That the use and occupation of the premises should be forever secured to the purchaser and those claiming under him or her, on payment of the ground rent, but on failure therein for fifteen days after the same shall become due, the premises are to revert to the corporation who shall immediately possess the power of re-entry to be exercised by its proper officer in the manner prescribed, and on the exercise of the right of re-entry the lots to be absolutely revested in the corporation free from any sale or incumbrance thereon." (See Record, p. 29).

In further declaration of the nature of the estate in the holders of the ground-rent lots the notice of sale published by the commissioners appointed by the municipal corporation to superintend the sale of the lots contains the following announcement:

"The terms specified by the ordinance are as follows: The lots will be set up at the valuation fixed by council and whatever sum is bid above such valuation will be required in cash and the person being the highest bidder shall be deemed the purchaser. Purchasers are at liberty to take a *lease* to him or his or her heirs and assigns forever of the lot so purchased at a ground rent of 5 per cent. on the valuation, payable quarterly to the city treasurer, or to extinguish the *leasehold* title by paying at any time to the city treasurer the original valuation money and all arrears of rent of the lot and take a title in fee-simple to the premises" (Record, pp. 30 and 31).

"On failure to pay groun l rent quarterly, the city to have the right to re-enter on twenty days' notice to the person in possession, and in case of non-payment then the lot and improvements to revert to the city. Purchasers taking a lease-

hold estate will be required to give security for the rent" (Record, p. 30).

"*Other particulars will be declared on the day of the sale*" (Record, p. 31).

The form of the deed by which the city conveyed the right to the use and occupation of the ground-rent lot to the purchaser recited that the purchaser had made his election for the present of retaining the valuation money in his own hands and paying ground rent for the use and occupation of the lot, which ground rent at and after the rate mentioned in the ordinance will amount to $—— per year. The city, in consideration of the increase money and of the rent to be paid and the covenants and agreements to be performed, bargained and sold the said lot, with the rights, members, and appurtenances thereof (Record, p. 19).

To have and to hold the said lot, with all and singular the *advantages* thereunto belonging, to the purchaser, his executors, administrators, and assigns forever, upon the express condition that the purchaser, his executors, administrators, and assigns, do and shall yearly and every year during such time as the valuation money shall remain unpaid by four quarterly payments pay into the city treasury the sum of $—— as ground rent for the use and occupation of the lot, and in case of failure to pay the rent for 20 days after any of the quarterly payments shall become due the lot shall revert to the city, who shall have the power of re-entry, to be exercised as therein prescribed (Record, p. 20).

And the true intent and meaning of the conveyance and of the parties is declared to be that on payment of the ground rent as therein directed the grantee, his heirs, executors,

and administrators and assigns, shall from time to time and at all times peaceably and quietly have, hold, use, occupy, and possess and enjoy the said lot and premises, and receive and take the rents, issues, and profits thereof and of every part thereof to his and their own use absolutely without the let, suit, eviction, or denial of the said corporation or of any person whatsoever acting under them or by virtue of their authority, subject only to such assessments and burdens as shall be common with other lot-holders in the city; and it was agreed that at any future time it should be in the power of the purchaser, his heirs, executors, administrators, or assigns, to pay in the valuation money with what interest may be due up to that time to the city treasury, and in that case the payment should be acknowledged under the seal of the city, signed by the mayor and a majority of the aldermen for the time being, attested by the clerk and endorsed on the conveyance, which should then and thenceforth vest an absolute estate in fee-simple to the lot in the purchaser, his heirs or assigns (Record, pp. 20 and 21).

It is admitted that all ordinances subsequently passed for the sale of lots laid out from the common conform to the first ordinance (Record, p. 31).

And that the conveyances and the purchases have always conformed to the deeds originally given (Record, p. 33).

The conveyance is referred to as the "lease" of the lot and the purchasers as the "lessees" (Record, p. 35).

The lots are referred to as lots "held under lease" from the corporation. (See Record, pp. 35, 42, 49, 50.)

Doubts having arisen as to the power of the municipal corporation to dispose of the town common, the contract made by the municipal corporation in making sale of these

lots was confirmed and validated by the legislature of the State by an act of the General Assembly assented to December 21, 1823, to confirm certain conveyances of the town common of Savannah made by the mayor and aldermen (Record, p. 31).

The language of the validating act is as follows:

"The mayor and aldermen of the city of Savannah, having been prohibited by an act passed on December 1, 1760, from alienating or granting away for any purpose whatsoever than by an act of the General Assembly the common appertaining to said town, and it being represented to the legislature that the mayor and aldermen, to the great advantages of the lot-holders and with much profit to the treasury of the city, had at different times granted and conveyed certain parts or lots of said common, and justice requiring that the agreements made by the corporation with the purchasers be confirmed:

"*Be it enacted, etc.*, That all and singular the conveyances heretofore made of the town common, whether in fee-simple or otherwise, shall be, and they are hereby, declared to be legalized, confirmed, and made valid to all intents and purposes, according to the covenants, limitations, and agreements of the same."

And again, in 1825, the legislature of the State conferred upon the said mayor and aldermen power to sell and dispose of any part of the property, domain, land, or lots to said corporation belonging or appertaining by lease for years or fee-simple as to the said mayor and aldermen or a majority of them shall seem meet and proper.

Assented to December 24, 1825 (Record, p. 31).

In the statement made by the municipal authorities and spread upon its minutes these "city lots" are set out and

inventoried as real estate belonging to the city of Savannah (Record, pp. 40 and 41).

And the official reports of the mayor, made annually, shows that the municipal corporation claimed to be the owner of these ground-rent lots as part of the "*city domain*" (Record, p. 42).

Under the contract of the city and the holder of these city lots or "leased lots" all that the city required from the holder was the payment of the ground rent to entitle him to the peaceable and quiet use, occupation, enjoyment, and possession of the lot (Record, p. 20).

No tax or assessment was levied by the municipal authorities on these lots, nor was any such payment provided for. No re-entry was provided for except on failure to pay the rent; but the lessee was to bear any assessment or burden that might be assessed against a lot-owner (Record, p. 51).

As long as the title remained in the city the tenant could claim that all assessments and burdens that might be made upon the lot should be assumed and be borne by the owner; hence, in order that all taxes that might be assessed by the State and all assessments for improvements should be paid by the lessee instead of the lessor, the stipulation was incorporated in the conveyance that the lessee should hold the same subject "only to such assessments and burdens as shall be common with other lot-holders."

The city ceased to dispose of its domain upon the ground-rent plan in the year A. D. 1872. Down to this time no attempt had ever been made to tax these lots. After the city had ceased to sell lots under the old ground-rent plan the taxation of these leased lots by the city began to be agitated (Record, pp. 51 and 52).

It is admitted in the record (p. 51) that no taxes were ever assessed by the city on the "ground-rent lots" or "leased lots" until under the ordinance that was passed May 29, 1878, and not under that ordinance until the year 1890 (Record, p. 51).

And that no taxes were assessed or levied by the city upon these "leased lots" from the year 1791 to the year 1890, the ordinance of May 29, 1878, being put in force in 1890 (Record, p. 51).

The first taxation by the mayor and aldermen of the city of Savannah on real estate was levied under authority of an act of the legislature assented to December 2, 1805 (Record, p. 48).

The first ordinance was adopted April 7, 1806, and levied a tax as follows:

"On all houses, buildings, lots and wards within the city as well unimproved as improved, and including all lots held by lease from the corporation, twenty-five cents on every one hundred dollars" (Record, p. 49).

At the council meeting, May 19, 1806, the tax ordinance was recommitted to a select committee, and the discussion of the ordinance continued until November 24, 1806, when it was finally passed by an amending ordinance:

"*Be it ordained, etc.*, That so much of the first section of the aforesaid ordinance as imposes a tax on lots held by lease from the corporation be and the same is hereby repealed" (Record, p. 50).

And from that time every tax ordinance to raise revenue for the city up to and including the ordinance of January 22, 1857, "excepted lots held by lease from the corporation" (Record, p. 50).

The tax ordinance of 1857 defined "real property" to include land itself and all buildings and other fixtures erected upon land, whether the land upon which such buildings and other fixtures may be erected be or be not itself subject to taxation. Section 4 of the same ordinance specifically exempted "each lot of land held at the time of the passage of this ordinance upon the payment of ground rent to the mayor and aldermen of the 'class commonly called city lots'" (Record, p. 50).

In one form or another every tax ordinance admitted the exemption of leased lots or city lots from city taxation. So also in the annual reports made by the municipal authorities in compiling the sources of revenue it is from time to time announced "that 'city lots' or lots under lease not being liable to city taxes are not included in the above comparison." And in the volume of city ordinances published in the year 1858 by the corporation, on page 538, is the following statement: "City lots or lots under lease not being liable to city taxation are not included in the above comparison" (Record, p. 50).

It further appears from the testimony of the oldest inhabitants in life at the time of the trial of the cause that at all sales of city lots the announcement was publicly made by the city marshal, the city official conducting the sale, which was also superintended by a committee of aldermen representing the council, that ground-rent lots were not subject to city taxes. The announcement was always made that lots thus sold would be free from taxation by the city. These terms were publicly and openly stated by the marshal and entered into the contract of sale. There is no evidence to contradict this element of the contract, and the announce-

ment is in conformity with the written notice already cited, in which the commissioners for the sale of these lots announce that other particulars will be declared at the sale (Record, pp. 58, 60, 61, 63).

Among other facts in the record of recognition by the municipal authorities that the ground-rent lots were a part of the city domain, producing a revenue to the city from rents alone, and not subject to taxation by the city, are the official statements made in the annual reports of the mayor for the years 1858, 1860, 1861, 1862, and 1863 (p. 50). In the annual report of the mayor for the year A. D. 1871 occurs the following statement:

"It is not known to the foreign public that a very large part of the real estate in the city consists of lots sold on condition of the payment of ground rents and are therefore not the subject of taxation" (Record, p. 51).

In the estimates of resources in the report of the finance committee made in the year 1841, when there was great need of funds, after most careful investigation, no suggestion is made to tax ground-rent lots (Record, pp. 52, 53, and 54; also p. 58).

In the report of Wm. Hunter, chairman of the finance committee, in 1872, which was adopted in council, it is admitted that—

"The reason why city lots are not taxed is that the city is understood to have bound itself not to tax them. It is of no moment that the stipulation does not appear in the deeds, the ordinances contain the real terms of the contract and control the deeds wherever the latter depart from or conflict with them. And as the city has never taxed such lots it is

difficult to resist the conclusion that such was the design when the ordinance of 1790 was framed" (Record, p. 56).

In the face of all these facts, it would seem that the municipal corporation is estopped from denying the relation of landlord and tenant and the existence of the contract not to levy or assess any tax on these lots.

The deposition of George W. Wylly, a resident of the city for fifty-five years, shows that he was chairman of the committee on public sales and city lots most of the time; that he served as alderman; that as such chairman he was present at the sales of these lots. The announcements of the terms of sales were made by the city marshal, who conducted the sales by the direction of the committee. He would usually read the advertisement and then the particular lot offered, stating the valuation placed on it by the city; then the option that the purchaser had, to buy either the fee-simple or on the ground-rent plan. If the fee, the entire purchase-money would be payable on execution of title. If on the ground-rent plan, 20 per cent. of the bid would be paid in cash and an annual ground rent of 6 or 7 per cent., according to the ordinance, on the balance of purchase-money, payable quarterly, and would also announce that so long as the lots were held under ground-rent plan they would be free from city taxes. These announcements were made under the authority of the committee; and often when the bidding would lag the marshal would remind the bystanders that there was only 20 per cent. cash payment required, and that there was no city taxes, but only the annual ground rent (Record, pp. 57, 58).

This witness further testified:

"There never was a question during the period of my entire service as alderman as to the meaning of the deed under which the ground-rent lots were conveyed by the city. The city had the power to re-enter for non-payment of rent and the holder the right to hold under a perpetual lease as long as he paid the ground rent when due. The city had no power to tax the ground-rent lots" (Record, p. 58).

The statement that the city marshal made the announcement at the sale of these lots that they would be free from city taxes is testified to by several citizens and is not denied by any witness (Record, pp. 60, 61, and 62).

The exemptions of the ground-rent lots from city taxation enabled the corporation to obtain better prices and consequently larger rents, and the benefit to the city in obtaining this perpetual income, which was larger than the revenue from taxation, which is shown in the tables on pages 44 and 45, the report of the city marshal on pages 47 and 48, and the testimony of the witnesses (Record, pp. 58, 59, 60, 61, 62, and 63).

In the year 1850 the municipal corporation of Savannah purchased a large body of land contiguous to the city known as Springfield plantation and divided the same into lots and proceeded to dispose of the same in the same manner as it disposed of the town common, except that the term of time for which the purchaser could retain the balance of purchase-money was limited to 24 years. The purchaser had the same option as to paying up the valuation money and obtaining a fee-simple title and the same covenant of quiet enenjoyment. There was the same forfeiture of possession and use on default of payment of the ground rent and the same right of re-entry, to be exercised in the same manner by the

municipal corporation; and the fee was conveyed by the same endorsement of payment by the mayor and aldermen, under the seal of the city, attested by the clerk, on the conveyance.

The deed conveying the Springfield lots is identical in form with the deeds conveying the town-common lots where the purchaser elected to retain the valuation money, except that the estate continues in the Springfield lots for 24 years, while the estate continues in the town lots so long as the purchaser or his assigns continues to pay the ground rent therein reserved to be paid.

Both conveyances are referred to in the ordinances as "leases," and, while the Springfield lots have been incorporated in the city corporate limits since February, 1854, the city has never attempted to collect from the lessees any other redendum than the rent reserved, nor has any tax been levied on the lots as the property of the lessees (Record, pp. 32, 33, and 19, 20, 21, and 22).

The report of the committee of the city council of Savannah on finance reported on page 52 of the Record, marginal pages 71, 72, was presented to the court and jury to show the depleted condition of the city treasury, the heavy liabilities due by the city, and the sources of income, and in the great strait in which the finances of the city then were in the search for new sources of taxation the ground-rent lots were not deemed subject to taxation and no attempt made to violate the obligation of the contract then universally admitted not to tax this species of property.

The lots were the property of the city, from which was derived a fixed rent, both under the covenant of quiet enjoyment and the terms of the sale as announced by the city

marshal and the positive admissions in the ordinances specifically exempting from city taxation these lots.

The owners thereof refused to submit to an ordinance subjecting them to city taxes adopted by the city after the sale of lots under the ground-rent plan had been permanently discontinued and the rights of the holders had been established for over seventy years.

When this ordinance to tax the city lots was sought to be enforced by the mayor and aldermen of the city in the year 1890 the plaintiffs in error brought their bill in equity to enjoin the levy of such tax, alleging the facts showing the contract and agreement not to tax and claiming the protection of the great constitutional inhibition against the violation of the contract. Discovery was expressly waived of the defendant, so that all defensive or responsive allegations were only pleadings and not evidence under the laws of Georgia. The defendant in its answer admitted that the petitioners or plaintiffs in error were the holders of lots in the city of Savannah commonly known as ground-rent lots or city lots, and that the ordinances and deeds were of the character described in the bill in equity and exhibited a copy of the form of the deeds, both for the city leased lots and the Springfield leased lots. At the trial of the cause the plaintiffs submitted the evidence admitted and exhibited in the answer and the facts and documents reported in the record. The defendant offered no evidence and moved for a nonsuit. The plaintiffs submitted the legal principles that are reiterated in the specifications of error set forth in this brief. After argument had, the court granted the motion for a nonsuit and dismissed the petition.

Thereupon the plaintiffs in error brought this case by

writ of error to the supreme court of the State of Georgia at the October term, 1898, of said court.

On March 17, 1899, the supreme court of Georgia rendered its decision, affirming the judgment of the court below.

To this judgment of the supreme court of Georgia a writ of error was sued out from this honorable court to the supreme court of Georgia on the 8th day of February, A. D. 1900.

SPECIFICATION OF ERRORS.

We assert that the supreme court of Georgia erred—

First. In deciding that by the contract disposing of the common to the lot-holders under the ordinance of September 28, 1790, the mayor and aldermen parted with all title to those lots bid in by those who elected to retain the purchase-money and pay ground rent.

Second. In deciding that under the contracts made with those who elected to pay ground rent the mayor and aldermen could lawfully tax said land as the property of the lessees.

Third. In deciding that the reservation of rents and the covenant of quiet enjoyment in the ordinances and contracts, the notices of sale, reports of the city officials, receipts of rents, assertion of title and ownership and conveyances set out in the record did not estop the mayor and aldermen to deny that the interest held by the lot-holders was a mere leasehold.

Fourth. In deciding that those who took lots under the ordinance of September 28, 1790, upon the ground-rent plan got anything more than the right to the use and occupation of the premises so long as the rent was paid and for 15 days after failure to pay an installment of rent when due.

Fifth. In deciding that the mayor and aldermen, after having covenanted that the lot-holders under the ground-rent plan should have quiet enjoyment of the premises, with all the advantages thereof, without let, suit, eviction, or denial, so long as the stipulated rent was paid, could nevertheless impose an additional annual burden, under the guise of a tax, as a condition to the quiet enjoyment of the premises.

Sixth. In deciding that the relation between the mayor and aldermen, of the one part, and the holders of ground-rent lots, of the other part, was not that of landlord and tenant.

Seventh. In affirming the judgment of nonsuit, thereby denying to the plaintiff the right of trial by jury of the issues of fact.

Eighth. The judgment of the supreme court of Georgia affirming the judgment of the superior court of Chatham county, Georgia, is violative of that provision of the Constitution of the United States which prohibits any action by a State or its authority which impairs the obligation of a contract.

Ninth. In deciding that the ordinances, conveyances, notices, and reports did not constitute a contract between the mayor and aldermen and the holders of the ground-rent lots exempting said lots from taxation.

ARGUMENT.

The determination of the question whether the ground-rent lots in the city of Savannah are subject to taxation by the city, in addition to the ground rent payable on the same to the city, depends upon the contract under which the city originally disposed of the lots and the holders obtained possession, acted upon by the city and lot-holder for nearly one hundred years.

The ordinance and the contract are to be construed and interpreted not according to the present powers of the city as restricted by the constitution of 1877, but according to the practical interpretation of the parties themselves, both at the time of the passage of the ordinance and of the execution of the contract, and continuously since that time, and the law as it existed at the time the contract was made. If the ordinance and contract has received a settled construction that has been acted on by both parties for a long period of time, and rights had been acquired under such settled construction, it is not competent for the present city council to change this construction and assert rights and powers in direct antagonism to such settled interpretations, impairing the obligation of the contract and imposing additional burdens and charges on the holders of the ground-rent lots not contemplated nor collectible under the settled interpretation of the contract and ordinance.

What was the settled construction and interpretation of the ordinance of September 28, 1790, and of the contract made thereunder in 1791 and subsequently?

The principle of contemporaneous and practical construction is expressed in some of the oldest maxims of the law.

"*Contemporanea expositio est fortissima in lege.*" "*Optima est legis interpres consuetudo.*" "*A communi observantia non est recedendum.*"

Long and continued usage furnish contemporaneous construction, which must prevail over the mere technical import of the words.

Rogers *vs.* Goodwin, 2 Mass., 475.
Rumsey *vs.* People, 19 N. Y., 41–50, 6th head-note.
Cronise *vs.* Cronise, 54 Pa. St., 255.
People *vs.* Maynard, 15 Mich., 463.
Scanlon *vs.* Childs, 33 Mo., 663.
Johnson *vs.* Joliet & Chicago R. R., 23 Ill., 202.
Weems, trustee, *vs.* Coker, 70 Ga., 749.
Harvard College *vs.* Boston, 104 Mass., 477–488.
Hardy *vs.* Waltham, 7 Pick., 110.
Edwards' Lessee *vs.* Darby, 12 Wheat., 206, 210.
U. S. *vs.* Moore, 95 U. S., 763.
U. S. *vs.* Johnston, 124 U. S., 253.
Solomon *vs.* Cartersville, 41 Ga., 157.

General and long-continued usage is not without its importance, and may be resorted to in aid of a proper construction of a statute or charter.

1 Dillon Municipal Corporations, sec. 93 and note.

The holders of ground-rent lots declined to pay the tax on the lots, denied the right of the city to tax the lots, resting their claim of exemption upon the following general grounds:

First. The fee to the lots is in the city, and the holders in their relation to the city were tenants under a perpetual assignable lease, on which only rent is due and payable, and the city could not tax its own property and could not increase the rent reserved by adding an additional per cent. under the name of taxes.

Second. That under the contract and conveyance from the city to the holder and his assigns the city covenanted that the holder should peaceably and quietly have, hold, use, occupy, and enjoy the lot and premises and receive and take the rents and profits thereof to his use absolutely, *without let, suit, trouble, eviction, or denial of the corporation* or any person whatsoever acting under it or by virtue of its authority, *on the payment of the said ground rent* (reserved in the conveyance) at the times and after the manner directed, and there was no reservation of any other charge, rent, or tax to the said city other than the ground rent in the agreement reserved (Record, pp. 20 and 29).

Third. That the assessments and burdens to which the holder was subject were only such as were common to other lot-holders in the city, and referred to such assessments and burdens that would have been chargeable to the city as the owner, and which were thus assumed by the holder as tenant (Record, p. 20).

Fourth. That the municipality from the time of the date of the first contracts of renting continuously until the passage of the ordinance of May 26, 1878, construed the contract as exempting the city lots from taxation so long as they con-

tinued subject to ground rent, and such construction of the contract was acted on by the city and the lot-holders and their assigns (Record, pp. 50, 51, and 56).

Fifth. That the city, in accordance with the universal interpretation of the original ordinance and deed, caused public notice to be given when these lots were exposed at public sale by the city marshal that the same would not be subject to city taxes so long as the lots were held under ground rent, and the same were purchased on the leasehold plan with such notice, and the present holders purchased the same with knowledge of and influenced by said notice, and that the city is bound by the said contract and cannot by any subsequent ordinance interfere with the obligation of the contract (Record, pp. 57 and 60).

Sixth. That the city having, in the most solemn and public manner, declared that the city lots were not subject to taxation by the city, and the recent lot-holders and their vendors having purchased the same and paid valuable consideration therefor on account of and influenced by such notice, the said city is estopped from denying that the said contract with the purchasers of the leasehold interest does exempt said lots from city taxes and only reserved a certain rent to be paid, and is estopped from levying any city taxes on said lots so long as they are held under ground rent.

THE CITY RETAINED THE FEE IN THE LOTS.

The minutes of council show that the lots were called indiscriminately "city lots," "leased lots," or "lots held under lease."

The ordinances, the deed, the public notice of sale, and

the announcement made at the sale together constitute a contract between the city and the purchaser.

The ordinance provided that a certain portion of the east and west common should be laid off into 120 lots; that the lots should be valued from one hundred and sixty to forty pounds sterling and sold and disposed of, the ground rent of the same to be after the rate of five pounds per annum on every one hundred pounds of value, the purchaser to pay down the purchase-money or else to hold his purchase on *ground rent payable quarterly*. (See Record, pp. 28, 29, and 30.)

From the above and from the declaration of the city that the disposing of the common was for the purpose of defraying the necessary expenses of the current year, "as well as establishing *a fund* for the purpose in the future," it clearly appears that the city contemplated disposing of these lots at a fixed ground rent because it fixed the amount of the ground rent in advance.

Secondly. Because it reserved no right to compel a sale of the entire interest in the lot. This was to be in the option of the purchaser alone.

Thirdly. Because it desired to establish a fund for the future to meet current expenses.

The conveyance which was executed by the city to the purchaser at such sale does not conflict with the ordinance; the ordinance declared that the estate of the purchaser who did not exercise the option to pay the purchase-money and take an absolute estate in fee-simple should amount to this:

"That the *use and occupation* of the premises should be forever secured to the purchaser and those claiming under him or her on payment of the ground rent," and on failure to pay the ground rent for fifteen days after it became due the premises to revert to the corporation and it to have the power of re-entry (Record, p. 29).

The deed exhibited to the answer, which is the form originally adopted and which has always been used in consideration of the payment of the increase money and of the rent to be paid and the covenant and agreement to be performed, conveys the lot, "to have and to hold, with all and singular the advantages thereof," not the remainders and reversions, to the purchaser, "his executors, administrators, and assigns," not to his heirs, and the conveyance was before the act of 1821, "on the expressed condition that the holder, his executors, administrators, or assigns shall yearly * * * pay the sum of —— dollars as *ground rent for the use and occupation of said lot*" (Record, pp. 19 and 20).

It is further "declared to be the true intent and meaning" of the instrument and of the parties to the same that on the payment of the *ground rent* at the times, etc., in the instrument directed, the purchaser, his heirs, executors, administrators, and assigns, shall from time to time," etc., peaceably and quietly have, hold, use, occupy, possess, and enjoy the lot and premises and receive and take the rents, issues, and profits, etc., to his and their own use absolutely without let, suit, trouble, eviction, or denial of the corporation or of any person whatsoever acting under them."

These are all terms familiar to the conveyancer and to be found in every well-drawn lease; and the terms in said conveyance above quoted are identical with the terms used in

the conveyance by the city to the purchaser of lots belonging to the city, known as "Springfield Plantation lots," a copy of which instrument is also exhibited to the defendant's answer (Record, p. 21).

We ask a comparison of these deeds, as by this means the intent of the corporation is made the more conspicuously clear. The "Springfield Plantation lots" were sold at public outcry to the highest bidder under an ordinance passed January 16, 1851. This ordinance was passed at a time when ground-rent lots were not considered subject to taxation by the city and while the city claimed to be the owner. This ordinance, like that of September 28, 1790, provided for laying off into lots a part of the city domain and disposing of the same. The lots were first valued, then put up for sale to the highest bidder, who is by the ordinance declared to be "*the purchaser of the lot.*" He is required to pay 20 per cent. of the aggregate of the increase money bid at the sale and the value fixed on the lot, and had the option to retain 80 per cent. of the purchase-money and to take a deed for a 24-year lease or estate, paying 7 per cent. on the amount of residue, in quarterly payments, by way of ground rent, with a further option to pay in the residue and obtain a fee-simple title at the expiration of 24 years (Record, p. 32).

The deed made to the "Springfield Plantation lots" is an "*indenture.*" The recitals in the first and second preambles are identical with those in the ground-rent deed, except the words "Springfield plantation" are substituted for the word "common" (Record, pp. 21, 22).

The third preamble differs, first, in limiting the time in which the ground rent is to be paid to the period of twenty-four years; second, in referring to the ground rent as interest

per annum "by way of rent;" and, third, in stating the option to pay up the residue of the purchase-money in twenty-four years and thereupon receiving a deed in fee-simple.

The words of conveyance are, "Demise set (let) and to farm-let," instead of "bargain and sell," but the conveyance is to the purchaser, his *heirs*, executors, administrators, and assigns. The habendum is to the purchaser, his executors and administrators, on *condition* that he pay yearly and every year the interest on the residue *by way of ground rent*, and in case of failure to pay the ground rent for twenty days or to pay the purchase-money at the end of twenty-four years the lot and premises *revert* to the corporation, and the right of re-entry and manner of re-entry are identical with the provisions of the ground-rent deed of conveyance; and all other covenants and conditions are the same, with only the insertion of "twenty-four years" instead of "at all times hereafter." It is "declared to be the true intent and meaning of the conveyance" that on the payment of the interest by way of ground rent at the time and after the manner therein directed "the purchaser, his *heirs*, executors, administrators, or assigns, shall and may from time to time and at all times during the continuance of this lease peaceably and quietly have, hold, use, occupy, possess, and enjoy the lot and premises and receive and take the rents, issues, and profits thereof to his and their own use without the let, suit, trouble, eviction, or denial of the said corporation or of any person whatsoever acting under them or by virtue of their authority." This is the precise covenant for quiet enjoyment that is found in the conveyance of the ground-rent lot.

Without going further into detail, the comparison shows

that the same general plan and intent actuated the corporation in disposing of the town common and the "Springfield Plantation," viz., to divide the property into lots, to put a fixed value on them, to put them up at public outcry to the highest bidder, who shall pay in the increase money and a fixed ground rent equal to a given per cent. on the valuation money, the purchaser to have the use and occupation, without let, suit, or eviction from the city, so long as the annual ground rent shall be paid, in the one case perpetually and in the other for twenty-four years, with the option in each case to secure a fee-simple absolute title by paying the valuation money in the one case at any time, and in the other within twenty-four years. The use and occupation and the rights and privileges of the purchaser are the same in each conveyance—they are those of a tenant having an assignable lease. The fee is retained by the city and is not conveyed until the purchase-money is paid; the tenant in the one case has a perpetual lease and in the other a term of twenty-four years. We shall see presently that a lease may be *in perpetuo;* that a perpetual lease is not invalid, but is recognized as a legal estate in Georgia.

In the notice of sale of lots, published by the commissioners appointed to sell the same, in the Georgia *Gazette* of June 13, 1799, it is stated that terms specified by the ordinance are as follows:

"The lots will be set up at the valuation fixed by council, and whatever sum is bid above said valuation will be required in cash, and the person being the highest bidder shall be deemed the purchaser; purchasers are at liberty to take a lease to him or her or his or her heirs and assigns forever of the lots so purchased at the ground rent of five per cent. on

the valuation, payable quarterly to the city treasurer, or to extinguish the leasehold title by paying at any time to the city treasurer the original valuation money and all arrears of rent for the lot and take a title in fee-simple to the premises. * * * Purchasers taking a leasehold estate will be required to give security in four times the annual ground rent for the due payment of the ground rent quarterly" (Record, p. 30).

Also the ordinance of February 27, 1851, authorizing any person holding a lot in the city of Savannah as tenant in common with another under ordinary city deed may pay one-half the balance of purchase-money due on the same and receive a deed in fee for one-half of the lot. "Any *lessee* of a city lot may on application to council divide said lot into two parts and receive separate leases for the same, and the party shall severally pay for the deeds issued" (Record, p. 34).

In the ordinance adding twenty feet to lots on Gaston street and in the form of the deed for the additional twenty feet it is provided that "the additional sum of $— as ground rent for the use and occupation of the same at the same time and on the same terms as in the original *lease* of the original lot" (Record, p. 35).

In the form of the deed for subdivision of city lots under the ordinance of February 27, 1851, set out on page 35 of the Record in this case, the property is conveyed to the grantee, "to have and to hold the same unto the said grantee forever upon the terms, covenants, and conditions mentioned and expressed in the original lease of said lot unto the former grantee and of record in the clerk of council's office; which said lease unto the original grantee is to be taken, held, and

considered as part and parcel of this lease and applying in the same manner as therein contained," etc.

The records of the city of Savannah contain at different times "reports of real property belonging to the city," and in the statement of the resources of the city of Savannah in the mayor's report, under the head of "the city domain," these city lots are set down as the property of the city as so many lots in a number of wards *under lease*. (See Record, pp. 40, 41, 42).

The form of the original transfers of these lots entered on the "registry of city lots in the treasurer's office" shows that they were transferred and assigned as leasehold property rather than as estates in fee (Record, p. 37).

No estate *in fee*, either conditional or otherwise, passed to the purchaser who paid rent, for the ordinance providing for the disposal of the lots laid out from the town common gave to the purchaser the option to pay down the valuation money or to hold his purchase under ground rent, and the deed states expressly "that the purchaser has made his election *for the present* of retaining the valuation money in his own hands and paying a *ground rent* for the *use* and *occupation*." So that it distinctly appears that the purchaser elected not to take a title in fee to the land, but to obtain the use and occupation on payment of a ground rent (Record, p. 19).

The conveyance does not create a fee conditional, because made at a time when the word "heirs" was necessary to a deed to convey a fee. The *habendum* is to the purchaser, his executors, administrators and assigns, upon the express condition that he and they do and shall, yearly and during such time as the valuation money shall remain unpaid, pay

into the city treasury $— dollars as ground rent, for the use and occupation of the lot. * * * And it is further "declared to be the true intent and meaning of the conveyance and of all the parties to the same that on 'payment of said ground rent at the times and after the manner therein before' directed, the purchaser, his heirs, executors, administrators and assigns shall and may from time to time and at all times hereafter peaceably and quietly *have, hold, use, occupy, possess and enjoy* the said lot and premises and take the rents, etc., to his own use absolutely without let, suit, trouble, eviction or denial of the corporation or of any one acting by virtue of its authority" (Record, p. 20).

A lease does not require any set form of expression. No particular form of words is necessary to constitute a lease.

Taylor's Landlord and Tenant, sec. 159.

Boone on Real Property, sec. 90 (8).

Any expression which shows an intention on the part of the lessor to divest himself of the possession in favor of the lessee and a corresponding intention of the lessee to come into the possession of the premises for a determinate period is sufficient.

Taylor's Landlord and Tenant, sec. 159.

Martindale on Conveyancing, sec. 326, p. 273.

A contract by which one is to pay an annual rent of 6 per cent. on the cost of a building with the right of becoming owner on paying the price is a lease. Its accidental provisions do not change its character.

Munic. No. 1 *vs.* New Orleans, La. Ann., vol. 5, p. 761.

Guilbert *vs.* Post, 28 Ohio, p. 276.

The use and possession of the lot passes from the lessor to the lessee for a determinate period, "during such time as the valuation money shall remain unpaid." *Id certum est, quod certun reddi potest.* The determinate period is "during the time the valuation money remains unpaid (Record, p. 20).

The instrument provides that when the valuation money shall be paid the lessee's estate shall be enlarged to a fee (Record, p. 20).

The fee, by the express terms of the conveyance, remains in the corporation until the valuation money shall be paid.

As has already been pointed out, the estate and conditions and covenants in the two instruments exhibited to the answer, the conveyance of the ground-rent lots and of the Springfield Plantation lots, are identical, save that one continues in force during such time as the valuation money remains unpaid and the other for 24 years.

The latter is admitted to be a lease; the former must also be so. That the time may continue *in perpetuo* does not defeat the intention to create a lease nor enlarge the estate to a fee, especially when the fee by the express terms of the conveyance, by the election of the purchaser, remains in the lessor or vendor and remains in it as long as the valuation money remains unpaid.

A lease may be made to continue so long as the lessee shall pay rent and perform its covenants.

Gould *vs.* Bugbee, 6 Gray, 371.

Worcester *vs.* Great Falls Mfg. Co., 41 N. H., 18–22.

Taylor's Landlord and Tenant, sec. 72.

Boone on Real Property, sec. 97.

Sadlier *vs.* Biggs, 27 Eng. L. and Eq., p. 74.

The conveyance expressly reserves the fee in the city until the valuation money shall be paid. It expressly conveys to the holder only the "use and occupation." As has already been shown, the estate conveyed and the covenants and conditions contained in the conveyance comport only with a perpetual lease and not an estate in fee (Record, p. 19).

In Folks *vs.* Huntley, 7 Wend., 210, the conveyance is the use of water in a creek with so much of the bank as may be necessary, etc., for such term of time and upon *the express condition*—that is, he, the said Huntley, his heirs, executors, and administrators, shall pay or cause to be paid to the grantor and his heirs and assigns annually and every year the sum of $—— and perform certain covenants. This instrument was declared to be a lease and the term a perpetual one.

The instrument made by the corporation to the purchaser conveys the lot to the party and his executors, administrators, and assigns on *this express condition*, that the said (party), his executors, administrators, and assigns, do and shall yearly and every year during the time, etc., pay or cause to be paid into the city treasury, etc., the sum of $—— as ground rent for the use and occupation of the said lot.

Are not these cases on "all fours" with each other? And if the estate in the Folks-Huntley case was a perpetual lease, is not the ground rent a similar estate? No greater interest is conveyed in the one than in the other. The estate ceases on breach of the condition and continues as long as the ground rent is paid.

The supreme court of Georgia, in the case of Atkinson *vs.* Orr, in 83 Ga., p. 34, have approved the decision of Folks *vs.* Huntley, and declares that a writing by which the grantor

stipulates with the grantee that he and his heirs and assigns shall retain possession as long as the rents are paid is a perpetual lease.

It seems, therefore, to be undoubtedly true that parties may contract so as to create a perpetual lease dependent on the prompt payment of an annual rent. There is nothing illegal or inconsistent in such estate; and this is the contract that the city of Savannah made with the purchasers of lots from the city.

The construction of the deed according to its express terms corresponds with the actual interpretation by the corporation, and the deed is a perpetual lease and not a fee conditional.

We have been unable to find any case in which a lease creating a tenancy and reserving an adequate annual rent with right of re-entry on the non-payment of rent or non-performance of other conditions has been adjudged void on account of being *perpetual in its duration.*

White *vs.* Fuller, 38 Vt., 206.

The town of Carondelet ordered a sale of its common, the purchaser to pay 2 per cent. on the amount bid as annual rent for ninety-nine years and 4 per cent. forever afterwards, with clause of forfeiture and re-entry for non-payment both in the ordinance and conveyance. The court held the conveyance to be a lease, and that the forfeiture for non-payment of rent was complete, Leonard, J., dissenting as to the effects of the forfeiture and coinciding with the supreme court of Georgia in Laurence *vs.* Mayor, etc., as to the equity of the lessee.

Taylor *vs.* Carondelet, 22 Mo., 105, 106, 112.

The city had full authority to let, lease, or rent any lot or lots of land. There is no restriction on this power, and the corporation has determined that a perpetual lease at an annual ground rent of a certain per cent. on a valuation which itself fixed on the property would be advantageous to the corporation, and there being no legal restriction on the power, the contract becomes binding on it. If there had been any want of authority, the contract made by the corporation was legally confirmed and made valid to all intents and purposes, according to the covenants, limitations, and agreements of the same, whether the conveyances were in fee-simple or otherwise.

Act of December 21, 1822, Dawson's Compilations, p. 443. See Record, p. 31.

But it is unnecessary to cite any confirmation of the conveyance. The corporation continues to collect the ground rent and to claim the enforcement of all the covenants and conditions in the instrument, and its force and legality is not questioned or denied.

The only payment required to be made to the city and the only condition for the perpetual use and enjoyment of the property as against any interference by the city is the payment of the ground rent. (See the contract.)

In the case of Laurence *vs.* The Mayor, etc., Savannah, the relations of the city and the lot-holder are thus stated by the court:

"In this case the city, by the resale of the lot, gets not only the amount then due, but also secures its future rents; it gets all that it ever contracted for, and by returning to the original *lessee* what is over and above the amount due at the

time of the resale, he gets nothing more than he was entitled to under the contracts."

Laurence *et al. vs.* Mayor, etc., Savannah, 71 Ga., p. 399.

The conveyance is construed as a lease and not as a conditional fee; for the court further says:

"The right to redeem and continue the lease, even after forfeiture and re-entry, exists whenever the lessee will pay what is due, and if the lessor refuse to receive it when tendered, the amount will be ordered paid into court and he will be enjoined from ousting the tenant."

See also the further remarks of the court.

Laurence *et al. vs.* Mayor, etc., Savannah, 71 Ga., 398, 399.

The consideration of the contract was not the amount of money fixed by the city as the price of the lot, but the increase money bid at the sale and the ground rent reserved, which was fixed before the sale. The covenant of the purchaser was not to pay the purchase-money due at any time whatsoever, but only to pay an annual ground rent quarterly.

The covenant of the city was not a warranty of title, but a covenant for quiet enjoyment in the precise terms used between landlord and tenant, with the usual right of re-entry and power to terminate the estate in case of default in the payment of the ground rent.

As further confirmation that the conveyance was intended to be a lease, the ordinance of April 7, 1806, subjecting ground-rent lots to taxation, afterwards amended, described them as "lots held under *lease* from the corporation." These lots are described as "held under lease" in the ordinances of December 14, 1807; January 7, 1809; March 11, 1825; August 27, 1839; January 4, 1811; January 3, 1812; July 3, 1828;

November 11, 1842. In the resolution of council passed April 8, 1806, the recorder was directed that in those cases where bonds (required by the ordinance of September 28, 1790) have not been executed the proper suit be commenced on the covenant contained in the *leases*, referring to the holders of ground-rent lots (Record, pp. 49 and 50).

Now, then, being a lease, the tenant pays to the landlord only the redendum actually reserved and no more.

The ordinance providing for the disposal of these lots at a fixed ground rent to purchasers at public sale and the conveyance to the purchaser reserved no other consideration than the annual ground rent, payable quarterly, and no other right or power to the mayor and aldermen save that of receiving said ground rent, and of re-entry in the event of default in the payment of the ground rent; and the conveyance contained an express covenant that the purchaser, his heirs, executors, administrators, and assigns, should peaceably and quietly hold the premises without let, suit, trouble, eviction, or denial, and so long as the purchaser paid the rent he could not be disturbed by the city in his possession and enjoyment of the lot.

In making the contract with the purchaser to convey the lot to him in consideration of a certain annual rent, the city retaining the absolute title, the city did not stipulate for any increase of the rent or the imposition of any other charges on the lot than the rent. It could not, so long as the contract remained of force, ask any other charge to the holder.

The lots are subject to the payment of ground rent to the city and "only such assessments and burdens as shall be in common with other lot-holders." These assessments and

burdens refer to the State and county taxes and local assessments for street improvements and sidewalks. The covenant was not to pay the city anything more than the rent, and this the city was to receive net. Whatever assessments and burdens that might be chargeable to other lot-holders, these and these only were to be borne by the holder of the lots held under lease (Record, pp. 20, 32).

When these lots should be subject to taxation by the State, the tax was not to be paid by the city, nor if paid by the holder to be deducted from the rent. If assessments were to be levied for street improvements or sidewalks to be laid, they were not to be chargeable to the city, but were to be assumed by the lot-holder.

The fact that the deed should contain a covenant of that nature demonstrates the truth of the conclusion that the holder of these lots did not take a fee, either conditional or absolute.

The owner of the fee is liable for all taxes. The grantor when he conveys an estate in fee is no longer liable for subsequent assessments and burdens on the property. He requires no covenant and makes no saving clause that the grantee shall assume and pay these burdens, but the landlord is liable for all taxes, assessments, and burdens of a public character that are not in the contract assumed by the tenant.

The law imposes the obligation on the landlord, when the lease is silent on the subject, to pay all State, city, and county taxes and assessments.

Taylor's Landlord and Tenant, 4th ed., § 341.

Wood's Landlord & Tenant, p. 683, sec. 417.

The phrase "Subject only to" is not in the Ordinance of Sept 28 1790 which controls and the insertion of these words in the deed binds only to the extent actually acted on + as construed by the parties
Levine v Marshall 20 How 588 666. 667
McGanahan v Manning Co 98 U.S 316. 324
U.S. v Iron Silver Mining Co 128 U.S 673. 680

A municipal corporation may hold property, not for governmental purposes, but for mere convenience of its people, or as source of profit to itself, or to supply a need which is commonly supplied by a private corporation. Such property is deemed to be held by the corporation in its social or commercial capacity as a private corporation and for its own profit, and such property is not presumptively excluded from taxation by the State.

Cooley on Taxation, pp. 173, 174.

2 Dillon on Municipal Corporations, sec. 773, 774 and note.

City of Louisville *vs.* State, 1 Duvall (Ky.), 295; 85 Am. Dec., 624.

The right of the State to tax the city domain of the city of Savannah was recognized by the passage of the act of February 18, 1856, to exempt the city of Savannah from taxation of the Springfield plantation.

Acts 1855–'56, p. 546.

In a lease that might be perpetual in its term, with a liability to taxation by the State, the city required the covenant from the lessee that he should hold the premises subject to such assessments and burdens only as should be common to other lot-holders, and the admitted facts show that the holder has always assumed and met such assessments and burdens. The construction actually placed on this covenant and the manner in which it has been performed for nearly one hundred years are binding on the present city council; the rights that had been acquired under this construction are as absolutely protected from impair-

An Act to exempt the City of Savannah from taxation upon certain property known as the Springfield Plantation.

Approved February 18th, 1856.

Section I. Be it Enacted, &c., That from and after the passage of this Act, the City of Savannah shall be exempt from taxation upon certain property known as the Springfield Plantation, now embraced within the corporate limits of said city.

Section II. (Repeals conflicting laws.)

ment as any other of the terms and covenants of the lease. The city council could, with as much right and propriety, increase the rent or diminish the term of time or compel the payment of the valuation money and force the holder to accept a fee-simple title.

The contract definitely fixed the amount that was to be paid to secure the rights to the use and occupation of the lot, and to receive and take the rents, issues, and profits thereof, and expressly excluded the right to increase that amount by taxation by declaring that the lot-owner should be subject *only* to such assessments and burdens as were common to other lot-holders (Record, p. 20).

The covenant of quiet enjoyment was expressly conditioned on the payment of ground rent at the time and after the manner prescribed in the contract. The payment of the ground rent was the extent of the city's demand on the purchaser. It could never demand the payment of the valuation money, and it was never, as owner of the lot, to be liable for any assessments or burdens that might be imposed on lot-holders, as the purchaser or lessee by express contract had assumed that burden.

The municipal corporation, retaining the absolute ownership of the lot, might as such owner be liable for any assessments or burdens that might be common to lot-holders, and to relieve itself of such liability by the express terms of the contract the renter covenanted to be subject to such assessments and burdens, and the evidence shows that the municipal authorities have never been called on to bear such burdens, but all taxes levied by the State and all assessments and burdens for sidewalks, street improvements, etc., have always been paid by the tenant, in common with other lot-holders.

All that the city reserved to be paid it was the specified ground rent and no more.

The State of Georgia, by the act of the General Assembly approved October 24, 1870, proposed to lease the Western and Atlantic railroad at a rent not less than $25,000. The act guaranteed the company should in no case be disturbed by the authority of the State so long as they keep the contract on their part and make the payment when due. The contract did not reserve the right of the State to tax the company.

On February 28, 1874, the legislature passed an act requiring the "president of all railroad companies to return on oath to the comptroller general the value of the property of their respective companies to be taxed as other property." Notwithstanding the power of the legislature to modify the chartered rights of corporations created since the adoption of the Code, the court say that the act guaranteed that the company should "in no case be disturbed by the authority of the State so long as they keep the contract on their part and make the payments when due." Therefore "the right does not exist by the leasing act in one party to revoke a highly important stipulation in the contract and at the same time to demand that the other shall abide by and perform all the others."

Western & Atlantic R. R. *vs.* Comptroller General, 54 Ga., 429–434.

In the case of the contract of lease of the Western and Atlantic railroad, the contract expressly provided that the company should pay to the State the same tax that the Central railroad did; otherwise under the guarantee of quiet

enjoyment nothing but the rent reserved could have been required.

The only payment required to be made to the city and the only condition for the perpetual use and enjoyment of the property as against any interference by the city is the payment of the ground rent. (See the contract.)

The city reserved no other right or power. There were no taxes due or payable to the city at the time the purchaser went into possession of the lot under the ground-rent contract, and the right of the city to increase the rent by adding a tax on the leasehold interest was not reserved. "What is not expressed does not exist."

The city did not expressly declare that "city lots" should be exempt from city taxes, because under its contract it did not dispose of the lots in fee, but only conveyed the use and occupation for the consideration of an annual ground rent and other covenants in the deed mentioned. It expressed all that it would require of the purchaser, and the purchaser was liable to pay what the contract declared to be the consideration for this use and occupation.

In the case of Murray *vs.* The City of Charleston, the city of Charleston had not expressly stipulated that it would never tax its own bonds, and yet, when subsequent to the sale thereof it levied a tax upon them, the Supreme Court of the United States held that the tax impaired the obligation of the contract to pay the stipulated interest.

Murray *vs.* Charleston, 96 U. S., 432.

The obligation imposed by the contract entered into between the city and the ground-renters is to pay to the city annually, in four quarterly payments, the rent reserved to

be paid. The valuation money was never demandable nor collectible, nor was there any obligation to pay it.

The obligation assumed by the city to the ground-renter was that so long as the rent was regularly paid in the manner prescribed it would secure to the holder of the lot the right at all times peaceably and quietly to have, hold, use, occupy, and enjoy the lot and premises, take the rents, issues, and profits thereof, without let, suit, trouble, eviction, or denial of the municipal corporation or any one claiming or acting under it.

The corporation itself, in the sales at public outcry of new lots laid out from the common, through its marshal, in the presence of a committee of council, and at the direct and specific instruction and direction of said committee, announces to the purchasers its interpretation of the contract and declares that the lots are to be disposed of on specific ground rent, payable to the city, and, so long as the lots are held under the contract to pay ground rent, they are not to be subject to city taxes. The testimony of Alderman Nichols and ex-Alderman Wylly and others is explicit as to these facts, and they are not rebutted nor denied.

The defendant denies that the city could be bound by the announcement, made at the sales of these lots, that the same while held on ground rent would be free from city taxes. We insist that these announcements were in fact only the reiteration of the interpretation given to the contract by the city in its ordinances and previous declarations. But the city could be bound by the terms of sale so announced.

Mayor, etc., Macon *vs.* Franklin, 12 Ga., 253.

A municipal corporation may be estopped by the action of

its proper officer when the corporation is acting in its private, as contradistinguished from its governmental, capacity and has lawful power to do the act.

Chicago *vs.* Sexton, 115 Ill., 230.

Dillon Mun. Corp., p. 322, note.

A State, when it enters into a contract with its citizens, can claim no exemption from the rules of law applicable to contracts between individuals, and all acts which relate to the contract—declarations of agents—which in the case of a citizen would affect the contract must be held as in like manner affecting a contract made by the State.

Patten *vs.* Gilmer, 42 Ala., 548.

City lots were required to be sold in presence of a committee on public sales and city lots, and this committee is presumed to have been present, the presumption being that public officers do their duty.

City Council of Augusta *vs.* Pearce, 79 Georgia R., p. 100, and authorities there cited.

A municipal corporation may so deal with third persons as to justify them in assuming the existence of an authority in another, which in fact it has never given.

1 Dillon Municipal Corp., sec. 452, note 2.

Davis *vs.* New York, 93 N. Y., pp. 250–253.

A municipal corporation may hold property, not for governmental purposes, but for mere convenience of its people or as a source of profit to itself or to supply a need which is commonly supplied by a private corporation. Such property is deemed to be held by the corporation in its social or

commercial capacity as a private corporation and for its own profit.

In making the sale or lease of these lots the city of Savannah was acting within its private or proprietary powers as distinguished from its governmental or legislative powers.

1 Dillon on Municipal Corporations, sec. 66 *et seq.*

1 Dillon on Municipal Corporations, 116, note 2.

Ratification by the city of unauthorized acts of its officers in the scope of the corporate powers is valid and binding, and the ratification may frequently be inferred from acquiescence after knowledge of all the material facts or from acts inconsistent with any other supposition. The same principle is applicable to corporations as to individuals.

1 Dillon on Municipal Corporations, sec. 463.

Dillon on Municipal Corporations, p. 322, note.

St. Louis *vs.* Armstrong, 56 Mo., 298.

Chicago *vs.* Sexton, 115 Ill., 230.

Let us see how the contract was regarded by the mayor and aldermen from 1791 to 1876, at least, the latter being the date of the last direct declaration on the subject from the corporation.

It is admitted that no city taxes have ever been claimed or assessed on the lots known as "city lots" or ground-rent lots (Record, p. 51) from the year 1791 to the year 1878 (when the ordinance now resisted was passed), but it is suggestive and important to trace the course of city legislation on this subject and the municipal interpretation of the contract regarding the taxation of these city lots.

The city treasurers' reports in the minutes of council show that there were no taxes levied on real estate in Savannah by the municipal corporation from 1791 to 1807. On April 7, 1806, under the authority of the act of the General Assembly passed December 2, 1805, the mayor and aldermen passed an ordinance whereby a tax was assessed and levied on all houses, lots, etc., improved or unimproved, and including "all lots held by lease from the corporation." Soon, however, after the passage of the ordinance the liability of these lots to city taxation was questioned, for it appears from the minutes of counsel that on the 10th day of May, 1806, a committee was appointed to report necessary amendments to the ordinance, and leave was granted to bring in a bill to amend it. (See Record, p. 49.) Again, on August 25, 1806, a committee was appointed to revise the ordinance and to report by bill such amendment as "they deem *necessary* and *proper*." The committee reported on September 8, 1806, recommending an amendment which struck out "lots held under lease from the corporation," and the minutes of council reported in the evidence show that the matter was carefully debated, and on November 24, 1806, the amended ordinance was passed. The amendment was in terms that "so much of section 1 of the ordinance of April 7, 1806, as taxes lots held by lease from the corporation be stricken" (Record, p. 50).

The tax ordinance to raise funds for current expenses thereafter were modeled on the ordinance of November 24, 1806, and each tax ordinance successively passed from November 24, 1806, to the ordinance of January 11, 1857, inclusive, excepted from taxation "lots held under lease from the corporation."

And it is to be noticed that the express exception of "city

lots" does not occur in the tax ordinances from 1857 to 1874. The phrase used is "real estate" or "real property;" but it is admitted that no taxes were assessed or levied on "city lots" under any of these ordinances, and the explanation is to be found in the tax ordinance of December 11, 1857, where the phrase "real property" is construed to "include land and buildings and fixtures erected on land whether the land be or be not itself subject to taxation;" and in compliance with this definition of taxable real property the tax ordinances passed in the years 1866 to 1874 use the following expression:

"Taxes shall be assessed, levied and raised at and after the following rates, that is to say: 1. At the rate of — per cent. per annum on real estate in said city according to the valuation of the year" (Record, p. 50).

And in the years 1874, 1875, and 1876 the assessment was as follows:

"Every person holding real property in said city including improvements on lots subject to ground-rent shall pay a tax of — per cent. on the value of such property."

The report of Hon. John Screven, one of the most learned and intelligent citizens, who had been many times mayor and who was conversant with the history of city lots and familiar with the contract and the construction given to it, is as clear as the testimony of ex-Alderman Nichols and ex-Alderman Wylly and others. He says in his annual report for the year 1871, page 5: "It is not known to the foreign public that a very large part of the real estate in the city consists of lots sold on condition of the payment of ground rent, and is

therefore not the subject of taxation and is not included in" the statement of taxable property in the city assessed for taxation (Record, p. 51).

The report of William Hunter, chairman of the finance committee, contains the following statement:

"The reason why city lots are not taxed beyond the ground rent is that the city is understood to have bound itself not to tax them" (Record, p. 56). "The ordinance of 1799, which was the first to provide for the sale of lots on these terms, contains a stipulation that the purchaser of such lot and all claiming under him shall have the use, etc., upon paying the ground rent. This ordinance has been followed either in terms or substance by all succeeding ordinances providing for such sale.

"It is of no moment that the stipulation does not appear in the deeds. The ordinances contain the real terms of the contracts and control the deeds whenever the latter depart from or conflict with them; and, as the city has never taxed such lots, it is difficult to resist the conclusion that such was the design when the ordinance of 1790 was framed."

See Record, p. 56.

The evidence also conclusively and affirmatively shows that those lots held under lease from the corporation were announced to be free from city taxes so long as they remained ground-rent lots at the time they were exposed for sale, the announcement being made by the city marshal under the authority of a committee of council superintending the sale.

The evidence further shows that in all the years of financial stress and difficulty, when every source of taxation was canvassed and every species of property and business were subjected to taxation, these lots were not taxed, sustaining

the contention that it was not an attempt to create an exemption from taxation nor a gratuity, but was a binding and valid contract, retaining the title in the city, whose obligation could not be violated. The rate of taxation upon taxable property was from time to time increased, new licenses were required, and the subjects of taxation were increased, but, however great the stress for money, no attempt was made to tax these leasehold lots. The reason for excepting "lots held by lease," or "city lots," as these lots were called, is not expressed in the minutes of council or in the ordinances, but the conclusion is irresistible that the contract being construed as a lease and the city having reserved a stipulated rent and having entered into an express covenant of quiet enjoyment on the single condition of a faithful payment of the rent, it could not assess a tax on the lots held by lease, and they were therefore clearly not subject to taxation, the city thereby declaring its understanding of the contract and its purpose in good faith of carrying it out. The power of municipal corporations to make exemptions, while denied by some authorities, was, prior to the constitution of 1877, admitted to exist in Georgia.

Mayor of Athens *vs.* Long, 54 Ga., 330.
Waring *vs.* Savannah, 60 Ga., 93.
Atlanta Street Railroad *vs.* Atlanta, 66 Ga., 104.

The sales and leases of the town common and the contract made by the city was confirmed by the General Assembly, and the language of the act is peculiar: "The mayor and aldermen to the great advantage of the lot-holders and with much profit to the city treasury having alienated granted and conveyed certain parts of the common and justice re-

quiring that the agreements made by the corporation with the purchasers be confirmed. The conveyances whether in fee-simple or *otherwise*, were legalized and made valid according to the covenants limitations and agreements" (Record, p. 31, acts Dec. 21, 1823); and the corporation was further empowered to sell and dispose of any part of the property, domain, lands, or lots by *lease* or fee-simple (Record, p. 31, acts Dec. 24, 1825).

If there could have been any question as to the power of the city to make the contract, this question has been settled and the objection removed by the act of the General Assembly approved December 21, 1823 (Dawson's Compilation, p. 443).

This act confirmed, legalized, and made valid, to all intents and purposes, all conveyances heretofore made of the town common, whether in fee-simple or otherwise, according to the covenants, limitations, and agreements of the same.

The municipal corporation of Savannah was further invested with power to sell and dispose of all or any part of the property, domain, land, or lots to the said corporation belonging or appertaining by lease for years or in fee-simple as to said mayor and aldermen or a majority of them shall seem meet and proper (act approved Dec. 24, 1825, P. A.; Dawson's Compilation, p. 465).

The General Assembly by subsequent act may validate and confirm previous acts of the corporation otherwise invalid. If the act could have been lawfully performed or

done under *precedent* legislative authority, the legislature may subsequently ratify it and give it effect.

1 Dillon Municipal Corporations, sec. 79, 544.

Bass *vs.* Columbus, 30 Ga., 845.

Winn *vs.* City of Macon, 21st Ga., 275.

Danielly *vs.* Cabanniss, 52 Ga., 212–224.

Wilkerson *vs.* Lehland, 2 Peters, 662.

The right of the State to make a valid contract to exempt from taxation, which comes under the protection of the Constitution of the United States, is now established beyond question.

Salt Co. *vs.* East Saginaw, 13 Wall., 376, and authorities cited in note.

Central Railroad and South Western R. R. *vs.* State, 92 U. S., 665.

Western & Atlantic R. R. *vs.* State, 54 Ga., 428–431.

Cooley on Taxation, pp. 66–68.

Exemption from taxation for a consideration is binding, and is a contract that cannot be impaired, but is protected by the Constitution.

Cooley on Taxation, pp. 66, 68.

Cooley on Constitutional Limitations, 5th ed., pp. 150 *et seq.*, 340, note 2.

New Jersey *vs.* Wilson, 7 Cranch, 164.

Salt Co. *vs.* East Saginaw, 13 Wall., 376.

Central R. R. & S. W. R. R. *vs.* State of Georgia, 92 U. S., 665.

Western & Atlantic R. R. *vs.* State of Georgia, 54 Ga., 428–431.

And in regard to exemptions arising from contracts Mr. Cooley, in his Treatise on Taxation, states, in note four, page 200:

"It seems that a city may make an exemption from taxation a part of the consideration for a water company supplying it with water."

Grant *vs.* Davenport, 36 Iowa, p. 393.
Cooley on Taxation, p. 201; note.

An exemption from taxation made on the basis of a contract in which the public is supposed to have received a full equivalent is admissible.

Cooley on Taxation, p. 214.

An exemption from taxation for a consideration is binding and is a contract which cannot be impaired, but is protected by the Constitution.

Cooley on Constitutional Limitations, p. 340.

The contract was beneficial to the city. In the first place, the city rented the lots on its own terms. It fixed the rental in advance at such amount as it deemed a fair compensation. The purchaser, induced by the advantages offered by the city, paid in many instances a large increase on the valuation in cash. The exhibit to the bill shows that this increase in some cases exceeded the original valuation placed on the lot by the city (Record, p. 47).

The exemption from city taxes was not a gratuity or privilege, but entered into the consideration when the lots were originally disposed of, and does not rest upon the idea of exempting property which is or would otherwise be subject,

but rests upon the fundamental idea that it was not the property of the lessee.

There were no restrictions on the power of the city to make such a contract of lease as to property which it had the right to control (Record, p. 47).

The city received the full benefit of this arrangement in the acceptance of the rents fixed by itself without diminution or reduction, and the payment in most instances of a large bonus or increase. The citizens have been induced to purchase from the city and from its assigns these lots at prices controlled by the *advantages* of fixed charges, as rent, instead of fluctuating charges, as annual taxation; and all the principles of estoppel apply to prohibit the city from levying a tax in addition to the ground rent.

1 Dillon Municipal Corporations, sec. 452, note 2.
Davis *vs.* New York, 93 N. Y., 250–253.
Moran *vs.* Miami Co., 2 Black (U. S.), 722.
13 Wall., 298–305, Pendleton *vs.* Amy.
Randolph *vs.* Post, 93 U. S., 502.

That the exemption of "city lots" from taxation was not a matter of gratuity, but was due to the construction of the contract made by the city with the holder, which shows that the city and not the lessee was the owner, is further shown in the records of the city in the statement of the city domain. The common had been gradually encroached upon, the plan of the city extended over it, and the same made off in lots, until in 1854 there were six hundred and forty-three lots in 22 wards held under lease, many of them improved (Record, p. 42), yet in giving the value of taxable real estate in the city the statement is made that city lots or lots under lease, not being

liable to city taxation, are not included in the comparative statement, and the 643 lots in 22 wards under lease are claimed to be part of the city domain, having a distinct valuation as part of the city resources and yielding a revenue in the rents derived from the same, while real estate held in fee-simple and the improvements on these lots or lots under lease are alone mentioned as the taxable real estate. The reason is plain: the ground-rent lots are the property of the city.

The city of Mobile transferred certain water works to Stein for 20 years, and covenanted that so long as he kept his covenant he should retain quiet possession, without let or hindrance of said city. The city could not require the payment of a license or tax for carrying on the business.

Stein *vs.* Mayor, etc., Mobile, 49 Ala., 362–369.

The city wished to build a sewer through defendant's lot. It was necessary to condemn or get his permission. He consented on condition that he could have three years in which to pay his proportion of the costs of the sewer, to which the city authorities agreed without any express authority. The sewer was built, and before three years had expired the city sued defendant for his proportion of the costs of the sewer. Held, that the action was prematurely brought. The city by using defendant's land under the agreement of the officers was bound by that agreement.

St. Louis *vs.* Armstrong, 56 Mo., 298.

A municipal corporation may bind itself by and cannot abrogate any contract which it has a right to make under its charter (or which has been ratified and confirmed by the

legislature), but one council cannot bind itself or others to a given line of policy.

Williams *vs.* City Council of West Point, 68 Ga., 816.

The city is estopped by the terms announced at its sales. When it enters into a contract with its citizens it is not exempt from the rules of law applicable to contracts between individuals, and all acts, declarations, and admissions of its agents which relate to the contract and which, in the case of a citizen, would affect the contract, must be held as affecting a contract made by it.

Mayor of Macon *vs.* Franklin, 12 Ga., 253.
Chicago *vs.* Sexton, 115 Ill., 230.
2 Dillon, Municipal Corporations, p. 322 (note).
Patten *vs.* Gilmer, 43 Ala., 548.
Barclay *vs.* Howell's Lessees, 6 Peters, 498.

The covenant of quiet enjoyment on the payment of the rent debarred the city from adding any terms whereby the use and enjoyment of the tenant could be restricted or forfeited.

Stein *vs.* Mobile, 49 Ala., 362–369.
St. Louis *vs.* Armstrong, 56 Mo., 298.
W. & A. R. R. *vs.* Comp. Gen., 54 Ga., 429–434.

The municipality having asserted its ownership of the said ground-rent lots by official entries on its minutes in its official reports, and the publication of this claim openly, continuously, and notoriously until it determined not to dispose of any more of its domain on lease at ground rent, it is estopped now from disclaiming the title and ownership

for the purpose of imposing a tax on its tenants as the owners while claiming the rent from them as lessees (Record, pp. 40 and 41).

A city cannot pass by-laws or ordinances which impair the obligation of contracts.

Stein *vs.* Mobile, 49 Ala., 369.
Cooley on Constitutional Limitations, m. p. 368.
1 Dillon, Municipal Corporations, sec. 450, n. 3.

The inhibition of the Constitution against the impairing of the obligation of a contract applies as well to city ordinances as to the State laws.

Home Ins. Co. *vs.* City of Augusta, 93 U. S., 116–121.
Murray *vs.* Charleston, 96 U. S., 432–440.
N. O. Water Works *vs.* La. Sugar Co., 125 U. S., 18–31.
Stein *vs.* Mayor, etc., Mobile, 49 Ala., 369.
1 Dill. Mun. Corp., sec. 450, n. 3.
Winter *vs.* Jones, 10 Ga., 196.

It is claimed that the State constitution of 1877 required the imposition of this tax. The answer is that the State constitution could not impair the obligation of the contract or validate such impairment.

Railroad Co. *vs.* McClure, 10 Wall., 515.
County of Moultrie *vs.* Savings Bank, 92 U. S., 631, 4th head note.
New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 650.

Tax levied on the leased lots is a tax on the city's own

property, which it certainly cannot impose for obvious reasons.

Galveston Wharf Co. *vs.* Galveston, 63 Tex., 14–24.
Stein *vs.* Mobile, 54 Ala., 27.

A contract entered into between parties, valid at the time by the laws of the State, no decision of the courts of the State subsequently made can impair its obligation.

Chicago *vs.* Sheldon, 9 Wall., 50.

The subsequent imposition of a tax by the municipal corporation on the lot so leased in addition to the rent reserved was in fact an increase of the amount to be annually paid for the use of said lot and was a violation of the obligations of the contract.

All that the city provided for in the matter of taxes was that as owner it should not have to bear any assessment or burden that might be common to lot-holders, but that the renter should bear these burdens and thereby secure to the city the full rent reserved.

An imposition of a tax by the city on the holders of these lots was a payment in addition to this rent and was a violation of the contract by increasing the annual payments to be made to the city beyond the amount specified in the contract.

Where a municipal corporation issued bonds paying a certain interest it could not impose any tax on such bonds. The tax necessarily diminished the interest and violated the contract.

Murray *vs.* City of Charleston, 96 U. S., 432.

The construction placed on the contract by the city, that the lots were held under lease and were not subject to taxation, as shown by the evidence and acted on so long as it continued to make such contracts, is binding on the parties and it is not within the power of the city to change this construction after it had ceased to make contracts of this character so as to bind the other parties to the contract.

It is claimed, however, that the estate of the holder of a "ground rent" or "city lot" is not a "leasehold estate," notwithstanding the declarations to that effect and the construc tion placed upon the conveyance by the municipal authorities, and the case of Gibbons *vs.* Gibbons, T. U. P. Charlton's (Ga.) Reports, page 113, is cited to sustain this contention. The case arose from the refusal of a lot-holder to pay State taxes on a "city lot."

While the argument of the attorney general of the State, Mr. Charlton, is a contention that the estate of the holder of a city lot is a fee to be defeated by the non-performance of a condition subsequent and is taxable to the holder, yet the judgment is simply that the lot is taxable by the State in the hands of the holder.

Mr. Charlton argues from a false premise. He contends that the deed conveys an estate to the grantee, his "heirs and assigns" forever. This is absolutely incorrect. The deed recites that the purchaser has "made election for the present of retaining the purchase-money in his own hands and paying a ground rent for the use and occupation of said lot," and "bargains and sells" the lot of land, with the rights, members, and appurtenances thereof; to have and to hold said lot, with all and singular the *advantages* thereunto be-

longing, unto the purchaser, his executors, administrators, and assigns forever."

It is true the purchaser covenants for himself, his heirs and assigns, to pay the rent, but so does every lessee in a well-drawn lease—*e. g.*, the leases of the "Springfield lots." The fee in the lots is retained by the municipal authorities clearly and distinctly. We therefore contend that the case of Gibbons *vs.* Gibbons simply decided that these lots were subject to State taxation. This is not denied; but the reasoning of counsel in that case, whereby the estate of the holder is claimed to be a conditional fee, is denied to be correct. The conveyance does not convey the lot to the purchaser, "his heirs and assigns forever," but to the holder, his "executors, administrators, and assigns forever."

The conveyance expressly reserves the fee in the city until the valuation money shall be paid. It expressly conveys to the holder only the "use and occupation." As had already been shown, the estate conveyed and the covenants and conditions contained in the conveyance comport only with a perpetual lease and not an estate in fee. The decision is not binding on the parties to this suit and is not *res adjudicata*, and does not effectually determine the nature of the estate between the city and the holder, and, being based upon an erroneous statement of the terms of the conveyance, has no force or authority, and is overruled by the current of authorities hereinbefore cited.

As the special covenant in the conveyance was sufficient to sustain the judgment of the court that the lots were subject to taxation by the State, the fallacious argument of the attorney general has no binding force on this court, and never did work estoppel to the city or the holders of the lots

to deny that the estate in the holder was a fee, or that the corporation had ever parted with the fee.

The holders of the "city lots" or "lots held under lease" were liable to the taxes assessed by the State, not because their estate in said lots was a fee, but because *by their contract* they had covenanted to pay these taxes. The argument of Mr. Charlton, reported by himself, as to the estate created by the ordinance and conveyance, was as unnecessary as it was fallacious, and he concludes his argument by the statement that if the estate is not a freehold of inheritance, "the form of the corporation grant subjects the lots to taxation by the State."

The construction of the words of the deed in Gibbons *vs.* Gibbons, above cited, has not the weight of authority; and the case is also overruled, so far as it holds that the conveyance cannot be a lease because it may last forever, by the recent decision of the supreme court of Georgia in the case of Atkinson *vs.* Orr, in 83 Ga., 37, and the decision in Laurence *vs.* The Mayor, etc., Savannah, 71 Ga., 398, 399, already quoted in this brief.

"Exemption, to be admissible," says Mr. Cooley, "ought to be made on the basis of contract, in which case the public is supposed to receive a full equivalent therefor, or on some ground of public policy."

In the case of these city lots the public received a full equivalent in the increase money paid for the privilege of holding these lots under ground rent or in paying the high values put on the lot in the first instance.

If the leasehold interest of the plaintiffs in error in the ground-rent lots are subject to taxation as such by the mayor and aldermen, the ordinance under which such tax

is levied is unconstitutional and void, no other leasehold interest in said city being taxed, and under the constitution of the State of Georgia all taxation must be uniform on the same class of subjects.

Art. 7, sec. 2, par. 1, Constitution of Georgia.

"Taxation is a fearful power, but like other legislative powers, in a representative government it has its checks and balances. It is certainly limited as to purposes, and has been generally believed by *local rights immemorially existing and universally recognized.*"

Cooley on Taxation, p. 693.

Respectfully submitted.

JOACHIM R. SAUSSY,
POPE BARROW,
Attorneys for Plaintiff in Error.

That the case affirmatively contains a federal question see
Walker Power Co v Sheldon RR Co 172 U.S. 485
Bridge Prop v Hoboken 1 Wall 142, 146
Spencer v Merchant 125 U.S. 352
166 U.S. 657

No. 222.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

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No. 222.

DAVID WELLS ET AL., PLAINTIFFS IN ERROR,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH ET AL.

BRIEF FOR PLAINTIFFS IN ERROR IN REPLY TO THE BRIEF FOR DEFENDANTS IN ERROR.

JOACHIM R. SAUSSY,
POPE BARROW,
Counsel for Plaintiffs in Error.

(17,669.)

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Supreme Court of the United States

OCTOBER TERM, 1900.

No. 222.

DAVID WELLS, THOMAS BALLANTYNE, ET AL.,
PLAINTIFFS IN ERROR,

vs.

MAYOR AND ALDERMEN OF SAVANNAH AND WADE, CITY MARSHAL, DEFENDANTS IN ERROR.

Brief for the Plaintiffs in Error in Reply to the Brief for Defendants in Error.

In the latter part of the eighteenth century the yearly outgo was found to exceed the yearly income of the city of Savannah, then known as the town of Savannah, by several hundred pounds. The precise amount of the shortage in the year 1790 was seven hundred and eight pounds sterling. It was evident that expenses must be cut down or income must be increased, and the city adopted the latter plan. They decided to dispose of some of the land which belonged to the city known as the common. The ordinance

by which they disposed of it was passed September 28, 1790, and is in the following words:

Ordinance of September 28, 1790.

An ordinance for laying off into lots certain parts of the common appurtenant to the city, and for disposing of the same.

Whereas public utility requires that certain parts of the common be laid out and disposed of:

SECTION 1. *Be it ordained by the mayor and aldermen of the city of Savannah and the hamlets thereof, in council assembled, and it is hereby ordained by the authority of the same,* That all that part of the east and all that part of the west common, situate, and lying between Bay and Broughton streets, extending eastwardly to a public — of one hundred feet in width, and westwardly to a public street of the same width, be, on or before the first day of November next, ensuing, laid off into one hundred and twenty lots; that is to say, eighty lots on the east and forty lots on the west common, each lot to contain sixty feet in width and ninety feet in depth, with certain squares, streets and lanes, in and between the same, agreeably to the plan marked No. 1 (one), hereunto annexed, and being so laid off, the said lots, or as many of them as can be, shall be sold and disposed of on the terms and conditions hereinafter mentioned; that is to say, the said lots shall be valued according to the estimate or schedule marked No. 2 (two), hereunto annexed from one hundred and sixty pounds to forty pounds lawful sterling money, inclusive, and the ground rent of the same shall be in proportion, and after the rate of five pounds per annum on every hundred pounds value, and it shall be in the option of the purchaser either to pay down the said valuation money, or else hold his or her purchase on ground rent, payable quarterly, as hereinafter mentioned.

Sec. 2. *And be it further ordained*, That said lots shall be put up at public auction in arithmetical progression, beginning at number one (1), in each ward, and so proceeding upwards until they shall be all disposed of (except as hereinafter excepted, or until so many of them shall be disposed of as there appear bidders for; and the said lots shall be respectively set up at the valuation contained in said schedule annexed), and whatever sum or sums shall be bid upon the said valuation at the same time of the sale of the said lots shall be considered as increase money and shall be paid down in cash, and the person bidding most of such increase money shall be deemed the purchaser of the lot then under sale; and in regard to the said valuation money, it shall be in the option of the purchasers either to pay the same down in cash, or else to retain the same in their hands and the hands of their heirs and assigns forever, on a ground rent, which ground rent shall be at and after the rate of five pounds, by the year, for every hundred pounds value of the purchase, and so in proportion for any greater or lesser sums, payable in four equal quarterly payments into the city treasury; but it shall, nevertheless, at any time hereafter, be in the power of such purchasers, or their heirs and assigns, to pay in the said valuation money, with what rent may be due up to that time, in full discharge and extinguishment of the said ground rent.

Sec. 3. *And be it further ordained*, That a deed, by way of bargain and sale, shall be made to all and every purchaser or purchasers of the said lots, under the seal of the city, signed by the mayor and a majority of the aldermen for the time being, and attested by the clerk, who shall enter a docket or abstract of such conveyance in a book to be provided and kept for that purpose, and a note or memorandum of such docket or abstract, shall be marked on the said deed. And the said bargain and sale shall vest either an absolute or conditional estate in the pur-

chaser according to circumstances, that is to say, an absolute one, if the valuation money shall be paid down, or a conditional one, if the said valuation money shall not be paid down, this latter also to become absolute if and when the said valuation money shall at any future time be paid into the treasury, and an acknowledgment thereof under the seal of the city, signed by the mayor and a majority of the aldermen for the time being, and attested by the city treasurer, shall be endorsed on such deed. And the said conditional estates shall amount to this, that the use and occupation of the premises are forever secured to the purchaser and others claiming under him or her on payment of the ground rent, but on failure therein for the space of fifteen days after the same shall become due, the said premises are to revert to the corporation, who shall immediately thereafter possess the power of re-entry, and having by means of their proper officers exercised such power and given a notice thereof in writing posted on the premises, the lot or lots so entered upon with all improvements thereon, are to be considered at the expiration of ten days thereafter as absolutely revested in the corporation, and the conditional estate therein determined, to all intents and purposes as fully as if the same had not been bargained for, or purchased, any sale or incumbrance or other act, made or suffered by the purchaser or purchasers or others under him, her or them to the contrary thereof, in anywise notwithstanding.

Sec. 4. *Be it further ordained*, That every purchaser in the class of those taking conditional estates shall at the time of receiving the deed of bargain and sale give bond to the mayor and aldermen of the city of Savannah for the time being with at least one good and sufficient security joined therein to be approved of in the city council in the penal sum of four times the annual ground rent of his or her purchase conditioned for the payment of such rent quarterly during the contin-

uance of said conditional estate without fraud or further delay; and also that in case of re-entry made by the corporation or their officers as aforesaid such purchaser shall and will forfeit and pay on the determination of said conditional estate into the city treasury at the rate of ten per cent. on the valuation money of his or her purchase, if there shall be no building erected thereon to the value of at least twenty pounds sterling; but if there shall be any such building erected thereon to that value, then the same shall excuse the party from said forfeiture of ten per cent. And in all cases the said building shall be appraised and valued by two or three citizens appointed by and sworn before the city council.

SEC. 5. *And be it further ordained*, That all lots from time to time re-entered upon by, and revested in the corporation in the manner before mentioned, within the space of five years from the first sales, shall be sold out again, on the same terms and conditions as the said lots are now directed to be sold and let out, upon a reasonable addition being made to the respective valuations for any buildings or improvements that may be made on said lots, respectively.

Ordinances of Savannah, Henry, p. 80.

Sections 6, 7, and 8 are irrelevant.

It will be seen at a glance that two different so-called "estates" were provided for by this ordinance. One is called an "absolute estate," which was created by the payment of the entire purchase-money and was followed by a deed in fee-simple to the purchaser. This absolute estate was simple and needed no explanation. The other, called a "conditional estate," was complex and involved and needed explanation and definition. This explanation and definition was given in the ordinance, and it is in the plainest words. To prevent the possibility of any mistake

as to their meaning, in the third section of the ordinance they declare:

"And said conditional estates shall amount to this, that the use and occupation of the premises are forever secured to the purchaser and others claiming under him or her on payment of the ground rent."

Two things were clearly settled:

First. The purchaser got nothing but the "use and occupation."

Second. These were "forever secured" to him "on payment of the ground rent."

It is impossible to doubt that they intended a lease by the conditional estates and not a sale.

This is confirmed by section 4 of the ordinance, which requires a bond for four times the annual ground rent, conditioned for the payment of the rent. If a sale had been intended, the bond would have been conditioned for the payment of the purchase-money.

It is true that the word sale occurs in these ordinances, but it clearly refers to the act of putting up the lots at public outcry for renting.

It is equally as clear that the ground-rent lot-holder had only an option to purchase. It is so stated in the ordinances. He had a mere option, and the ordinances call it an option. The following ordinances contain the word option as describing the right to become a purchaser which the ground-rent lot-holder had:

June 19, 1815, Ordinances of Savannah, Henry's Digest, p. 100.

September 28, 1790, Ordinances of Savannah, Henry's Digest, p. 80.

May 30, 1799, Ordinances of Savannah, Henry's Digest, p. 89.

February 3, 1837, Ordinances of Savannah, Henry's Digest, p. 106.

March 14, 1839, Ordinances of Savannah, Henry's Digest, p. 110.

February 11, 1841, Ordinances of Savannah, Henry's Digest, p. 112.

When speaking of the money paid to the city quarterly it was called "ground rent" in terms in the following ordinances:

September 28, 1790, Ordinances of Savannah, Henry's Digest, pp. 80, 81, 82.

May 30, 1799, Ordinances of Savannah, Henry's Digest, p. 89.

April 20, 1801, Ordinances of Savannah, Henry's Digest, p. 92.

June 19, 1815, Ordinances of Savannah, Henry's Digest, p. 100.

February 3, 1837, Henry's Digest, p. 107.

In this latter ordinance is an expression which throws light upon the use of the word "interest" in one or two ordinances in place of ground rent. The language is this:

"The annual ground rent to this corporation equal to the interest on the amount of said residue at the rate of six per centum."

The same expression is used in the ordinances which follow:

March 14, 1839, Ordinances of Savannah, Henry's Digest, p. 110.

February 11, 1841, Ordinances of Savannah, Henry's Digest, p. 112.

In this connection it is well to remember that 5 or 6 per cent. on the valuation placed upon these lots paid as ground rent would give the city a great deal more money than the taxes upon the same amount of property in value. Those who took the absolute estate probably paid in taxes about 1 per cent. Those who took the conditional estate paid as rent five or six pounds, lawful sterling money, on every 100 pounds of valuation. Besides, these ground-rent lot-holders paid taxes on the improvements which were put upon the property, and are still paying them without complaint.

Printed Record, p. 50.

An ordinance passed in 1851 calls this ground rent interest, but it also incorporates in itself the third section of the ordinance of 1801, which is a copy of the third section of the ordinance of 1790.

As late as the year 1851 the city council, in disposing of a strip of land on the north side of Gaston street, which was added to the lots adjoining it, used this language, speaking of the duty of the lot-holder:

"Shall every year, by four equal quarter-yearly payments, pay or cause to be paid into the city treasury of Savannah the additional sum of —— as ground rent for the

use and occupation of the same at the same time and on the same terms as in the original lease of the original lot."

Ordinance July 31, 1851, Ordinances of Savannah, Henry's Digest, 131.

Printed Record, p. 35.

It seems clear that not only the original framers of this ordinance of 1790 understood that the ground-rent lot-holders were tenants and the city was the landlord, but several generations of those who followed them adopted and acted upon the same construction.

From 1790 to 1878, a period of eighty-eight years, no taxes were ever levied upon these ground-rent lots by the city.

Printed Record, pp. 50, 51.

From 1790 until 1878 all the tax ordinances treated them as being exempt from city taxes. They were not considered subject. The improvements put upon them by the tenant, however, were taxed by the city and are still taxed.

In the spring of 1806 an ordinance was passed which provided for taxing ground-rent lots, but it was reconsidered, referred to a committee, fully discussed, and in the following autumn that part of it was repealed before it was ever put into operation.

Printed Record, p. 50.

In the year 1878 an ordinance was passed taxing the ground-rent lots. No attempt was made to enforce it until 1890. When the levy was made this suit was brought to enjoin it, and the case is here by writ of error to the supreme court of the State of Georgia, which court held that the ground-rent lot was subject to taxation by the city.

After the ordinance of September 28, 1790, was passed it was necessary to draw conveyances. The conveyance of the "conditional estates" in some respects departed from the ordinance and contained language and incorporated terms which are not to be found in the ordinance. Among other interpolations is the following:

"Subject only to such assessments and burthens as shall be in common with other lot-holders in the city."

Printed Record, p. 20.

This language occurs at the end of the paragraph in the conveyance which states that the lot-holder, so long as he pays the ground rent, should have the use and occupation of the premises without let, suit, trouble, eviction, or denial. It is upon these words above quoted that the supreme court of Georgia mainly rested its decision. That court held that they made the property subject to the city taxes.

Bearing in mind that they are not to be found in the ordinance, and that no language of that sort or having any similar meaning is found in the ordinance, and that, so far as we know or can discover, they crept into the deed or conveyance without any authority whatever, it becomes important to inquire whether they possess any legal force.

Counsel for the defendant in error in his brief takes the position that if the ordinance and the deed conflict, the latter controls. This statement is found on page (1*a*) under subdivision (*b*). The same idea is repeated elsewhere, in the same brief. We respectfully submit that the law is just the opposite. It is familiar law that an act of a legislative body, such as Congress or a State legislature or a city council, disposing of any part of the public domain, must be

strictly followed. When Congress or a State legislature or the legislative body of a municipality passes an act or ordinance, as the case may be, making disposition of land which is the property of the United States or the State or the municipality, no departure from the terms or limitations of the act or ordinance can lawfully be made. The deed or lease, or whatever other form of conveyance may be used, is the work of a mere scrivener. It must conform to the act or ordinance which authorizes it to be made. He cannot make a new and different bargain. The ordinance must control the terms of the conveyance. He can neither leave out conditions which are contained in the ordinance nor insert conditions which are not contained in the ordinance.

It would not be in the power of every member of Congress to change the terms of an act disposing of any of the public lands except by another act amending or repealing it, lawfully passed. This court has several times announced the principle which we have above stated in unmistakable terms.

Irvine *vs.* Marshall, 20 Howard, 558, 566, 567.
McGarrahan *vs.* Mining Co., 96 U. S., 316–321.
U. S. *vs.* Iron Silver Mining Co., 128 U. S., 673–680.

In the case of Irvine *vs.* Marshall the principle is distinctly announced that neither the practice of the Land Office of the National Government nor the action of a State government could give any validity to a departure in a patent from the terms of the act authorizing the sale.

In the McGarrahan case the court declared that the terms of the act disposing of the land were "mandatory."

In the U. S. *vs.* Iron Silver Mining Co., the variance between the contract and the act of Congress was in adding language not found in the act of Congress, in the statements concerning lodes and veins, in locating placer mines. The court held the addition void.

In the case mentioned on page 12 of the brief of the defendant in error the "instrument" referred to by the Chief Justice was the act of the Rhode Island legislature.

Providence *vs.* Billings, 4 Peters, 561, 562.

The claim is now made for the first time, so far as we know, that when by act of Congress, a State legislature, or city council, public land is disposed of, it is in the power of those who draw the conveyance to change the contract and dispose of the land upon terms different from those fixed by the act or ordinance.

But for a hundred years, nearly, these words thus interpolated in the conveyance have been held to mean that the lot-holder must pay the State and county taxes and city taxes on the improvements, and that the city cannot tax the land. It is now contended that the lot-holders are estopped to say that these words thus interpolated are unauthorized by the ordinance, and therefore they are not bound to pay the State and county taxes. It is said that they have acquiesced in that construction too long to raise the question now. True. But the estoppel must be mutual. If the lot-holder is estopped to say that he is not liable for State and county taxes, the city is estopped to say that the lot is liable for city taxes.

Both parties for nearly a hundred years have agreed that

the lots were subject to State and county taxes, but were not subject to city taxes.

Printed Record, pp. 50, 51.

If we are correct in our statement of the law, that an interpolation in the conveyance of language changing the terms of the contract, as set forth in the ordinance, is void, then the words added to the conveyance possess no force, except such as is derived from the conduct of the parties. The only claim to respect which they can have in a court grows out of the fact that the parties have dealt with the subject in a certain way so long that they will not now be permitted to say that it means anything different from what that conduct has imported into it. This being true, all that they did must be considered. Their conduct on both sides towards the contract must be given due weight. All that they have agreed to by conduct must stand, or all must fall. It will not do to say that the lot-holder has agreed for a hundred years that he is bound for State and county taxes, and therefore he must remain bound, and at the same time to say that although the city has agreed for a hundred years that she cannot tax this land, nevertheless she can tax it. If these words were mere void surplusage when they were first written into that conveyance and are only binding because the parties have acted under them, then we do not look to the language itself alone for their meaning—but they mean what the conduct for a hundred years of both parties has made them mean. Neither one of the parties will be heard to say that a new rule can now be made.

This case was tried in both State courts upon a misapprehension. Counsel for the defendant in error in his

brief in this court is laboring under a misapprehension. The contention of the plaintiff in error has all the way through been misapprehended. It is not contended now, and never has been contended by the plaintiffs in error, that there is any contract, upon which they rely, which exempts from taxation any property which is subject to taxation. The contention of the plaintiffs in error is that the contract of September 28, 1790, between the city and the ground-rent lot-holders kept the lots from being subject to city taxes. That contract did not make them subject, and they were not subject before. A mere lease was made by that ordinance. No title passed. The contract kept them out of the class of subjects liable to city taxes. It never was in the power of the city to tax them, because the title remained in itself. It must be borne in mind that the lessor in this case was and is also the taxing power. If the lots are taxed by the city, the tax goes into the same pocket as the rent. The lessor collects its rent as landlord for the use of its property, and then proposes at the same time to tax its tenant on the same property as the tenant's property. No one can collect rent except on his own land, and no power can levy taxes on its own property. When the city collects rent the law says the property must belong to the city, or rent cannot be due. When the city collects taxes the law says the property cannot belong to the city, for the city cannot tax its own. When such a lessor has leased its property under such a contract as that of 1790, and when in the same contract it has covenanted with its tenant that the use and occupation of the premises are forever secured to him on payment of the ground rent, a subsequent ordinance taxing that property impairs the obligation

of that contract. That is the contention of the plaintiffs in error.

The city leased this property and covenanted that the use and occupation should be secured upon the payment of grount rent. For a hundred years it kept faith with its tenant. Any attempt now to exact any more money out of him by ordinance, under any name or in any guise, impairs the obligation of the contract.

The supreme court of Georgia in the case referred to by the counsel for the defendant, the case of Laurence *vs.* The Mayor, 71 Ga., 392, took what seems to us to have been an entirely correct view of the relations of these parties. It is a great mistake to suppose that upon a resale of one of these ground-rent lots the city collected the purchase-money or bid. It only collected the balance of rent due. An examination of the Laurence case will show clearly that the supreme court in that case so held. No one can doubt that this is correct who will read the fourth section of the ordinance of September 28, 1790. It is conclusive that it was a lease and not a sale which was entered into between the parties. If it had been a sale the balance of purchase-money would have been collected; as it was a lease, the balance of rent was collected.

The provisions with regard to subdivisions and with regard to transfers of leases point clearly to the relation of landlord and tenant and not that of vendor and vendee.

Record, pp. 34, 36, 37.

Of course, if the "lessee," as the ordinance on page 34 of the record calls him, was a purchaser and owner, he could divide his own lot without going back to the city.

In like manner, if he was a purchaser, a mere endorsement of transfer such as are found on pages 36 and 37 would not operate to pass a title from him or to convey any interest or ownership.

In 1787 the legislature of Georgia passed an act relating to the city of Savannah, section 5 of which is in these words:

"*And be it further enacted, etc.*, That the wardens to be chosen under this act, or majority of them, are hereby vested with full power and authority to let, lease, or rent, at public sale, any lot or lots of land, including the lot of land containing sixteen acres called the Spring, westward of said town of Savannah, and the building commonly called the Vendue house, and the monies arising therefrom shall be applied by the said board of wardens to the correcting this act into execution."

Watkins' Digest, pp. 354, 355.

It was by authority of this act that the ordinance of September 28, 1790, was passed.

The eleventh section of this act of 1787 repealed the old colonial act of 1760.

Watkins' Digest, p. 355.

It appears, therefore, that the act of 1823, which ratified the sales, was unnecessary.

We submit that due weight is not given by counsel for the defendant in his brief to the notice of sale published by the commissioners. For the terms of this notice see—

Printed Record, p. 30.

Counsel has failed to observe that this was a notice given to the public by commissioners appointed under section 7 of the ordinance. It was an official act. The same is true of the reports of the mayors and marshals. It is no more legal for a city to entrap people by such declarations than it is for any other person to do so.

But independently of these acts of the officers, the ordinances passed from 1790 to 1878 are the acts which estop the city. It never has been doubted that legislative action will estop any government, whatever may be said of the other departments.

It is objected by the defendant in error that this court is without jurisdiction because there is no Federal question in this case.

The language in the petition which, we think, makes a Federal question is this:

"Your petitioners further show that the ordinance passed by the said mayor and aldermen imposing a tax upon said ground-rent lots, impairs the obligation of the contract made by the said mayor and aldermen under the ordinance and conveyance when said lots were originally disposed of by the said mayor and aldermen, and that said ordinance is unconstitutional, illegal and void."

Printed Record, p. 6.

We respectfully submit that this language directs attention to the tenth section of the first article of the Constitution of the United States so plainly as to leave no doubt about what is meant, upon the mind of any well-informed person.

Such language has often been held sufficient.

Water Power Co. *vs.* The Street R. Co., 172 U. S., 485.
Bridge Prop. *vs.* Hoboken, 1 Wall., 142, 143.
Spencer *vs.* Merchant, 125 U. S., 352.

Of the cases cited in the brief for the defendant in error, Oxley Stave Co. *vs.* Butler had only two issues in it in the State court: First, were the subscriptions to stock authorized by law? And, second, was there fraud in the decree?

Kipley *vs.* Illinois contained nothing which directed attention to any constitutional provision.

Butler *vs.* Gage was an attempt to raise the Federal question after argument, re-argument, and final decree in a State court.

New Orleans *vs.* Water Works went off upon rules of general jurisprudence.

As stated in the first brief for the plaintiffs in error, the ordinance levying this tax is an authority exercised under the State of Georgia, and if repugnant to the constitution is subject to the same fate as an act of the legislature would be.

Ex parte Virginia, 100 U. S., 339.
Neal *vs.* Delaware, 103 U. S., 370.
Yick Wo *vs.* Hopkins, 118 U. S., 432.

Discovery having been waived, the answer of the defendant in this case is not evidence, although sworn to. It is mere pleading.

Code of Georgia 1895, par. 4962.

But an admission in such an answer is evidence for the plaintiff.

Code of Georgia 1895, par. 5056.

The defendant's answer admits the succession of plaintiffs as lessees.

Printed Record, p. 14.

Respectfully submitted.

JOACHIM R. SAUSSY,
POPE BARROW,
Counsel for Plaintiffs in Error.

No. 222.

Brf. of Adams for Defts

Filed Feb. 14, 1901.

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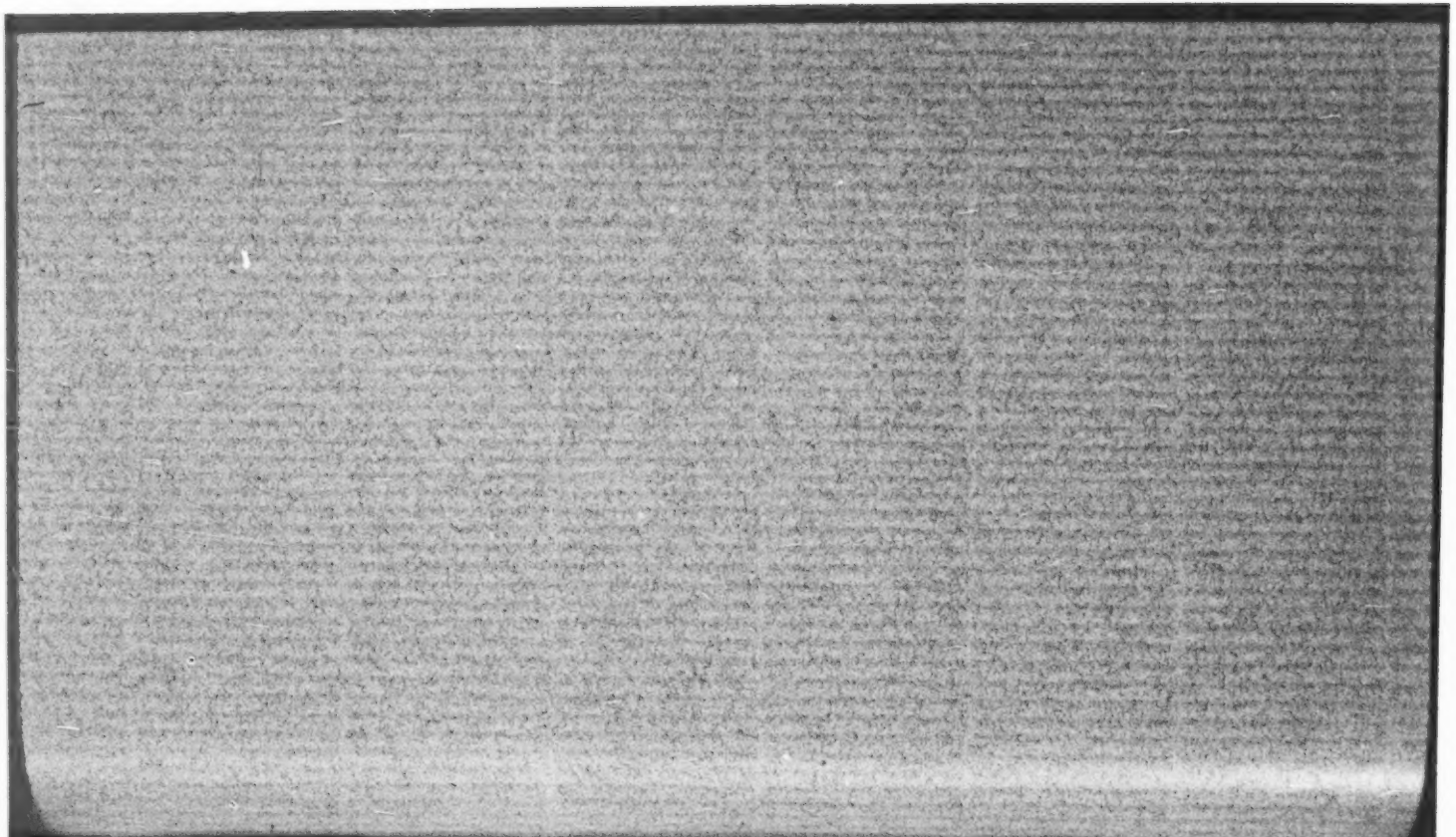
OCTOBER TERM, 1900,

No. 222.

DAVID WELLS, Et Al.,
Plaintiffs in Error,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH, Et. Al.,
Defendants in Error.

Error, from the Supreme Court of Georgia.

BRIEF FOR DEFENDANTS IN ERROR.



In the Supreme Court of the United States.

OCTOBER TERM, 1900.

DAVID WELLS, THOMAS BALLANTYNE, *Et Al.*, *Plaintiffs in Error,* vs. THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH, AND WADE, CITY MARSHAL, *Defendants in Error.*	*Error, from the Supreme Court of Georgia; No. 222.*

STATEMENT OF THE CASE.

While the propositions of law, which we will submit, may make unimportant the objections that we have to the statement of the case made by Plaintiffs in Error, we beg to submit them :—

(*a*). There is nothing in the action of Council of May 18, 1790, mentioned on page 26 of the Record, which can be construed into a purpose to exempt from taxation the property referred to after it had been sold on what is commonly called "the ground rent" plan. While the income due to the interest on deferred payments (inaccurately called "ground rent") might "establish a fund for the purpose of meeting the current expenses of the city," at that time very small, this purpose is entirely consistent with the subsequent taxation of this class of property.

(*b*). Plaintiffs in Error undertake to state the substance and legal effect of the contract made with those purchasers who elected to pay a part of the purchase money. We do not concur in the correctness of their statement. The form of the deed used is admitted to be that set forth on pages 19, 20 and 21 of the Record. This deed must speak for itself, and we hereafter submit our contention as to the legal effect of this instrument.

The form of the paper set forth as Exhibit "B" to the answer, on pages 21 et seq., is that appertaining to the leases of the Springfield lots, which are not involved in the case at bar.

The ordinances under which this class of property was sold all agree in form and substance with the original ordinance of September 28, 1790, to be found on pages 28 et seq. of the Record. * It seems to us that this ordinance and the deed are in entire harmony, but, if they are not, the deed, we submit, would control.

While the scheme of the ordinance seems to be that the purchaser who elected to take the property on what was called the ground rent plan was required to pay the increase money over and above the valuation money, or minimum price, in cash, and had the option to retain the original valuation money and pay for its use at the rate of five (5) per cent. per annum, the practice seems to have grown up of permitting a purchaser to pay

* The provision as to a bond was abandoned (Page 3 of Record).

twenty per cent. of his entire bid and hold the balance on this interest, or ground rent. This is indicated by the testimony of Mr. Wylly, put in by Plaintiffs in Error, and to be found on page 57 of the Record. See also ordinance quoted on p. 25 of this Brief and also on p. 7 of Ackley Brief for Plffs in Error.

(c) The advertisement quoted from on Page 3 of the brief for Plaintiffs in Error, and set out on pages 30 and 31 of the Record, is dated some years after the original ordinance and sales thereunder, and is not connected in any way with the property of these plaintiffs. All that appears from the record is that they put in evidence an advertisement from the "Georgia Gazette," contained in its issue of June 13, 1799. It may be inferrable that it referred to some contemplated sale of this class of property, but the property involved in the suit at bar is in no wise connected with this advertisement, and it does not appear that it was the advertisement generally, or commonly, used. In any event this notice could not affect in any way the plain terms of the deed subsequently entered into by the predecessors in title of these Plaintiffs in Error.

The statement in the brief that this advertisement is "in further declaration of the nature of the estate" merely expresses the conclusion of Counsel.

(d) Although, in some cases, ordinances refer to these conveyances as leases, no ordinance providing for their sale used this word, or any word tantamount to it. The deed set forth on page 35 of the record under the heading "Deed for subdivision of a city lot under ordinance of February 27, 1851" is not the form of the deed used when these lots were sold. On the contrary, the one already alluded to is admitted to be the deed. It does not appear that this was the form when a subdivision was made. All that the record shows is that Plaintiffs in Error put in a deed which appears to have been made by the City on the 27th of February 1851 to Mr. Moses J. Solomons, but no showing was made as to

this deed being that generally used, and neither the Plaintiffs in Error, nor their holdings, were connected with it in any way.

(*e*) The validating act of December 21, 1823, set forth on page 31 of the Record, does not refer in any way to any agreement or contract with reference to the taxation or non-taxation of this class of property, or to the subject of taxation at all. It undertakes to confirm the conveyances made by the City, whether in fee simple or otherwise. The deeds commonly called the ground rent deeds did contain covenants and agreements, and hence the language of this act in so far as it may refer to them.

Plaintiffs in error simply assume that the act of 1825, mentioned on page 31 of the Record, authorizing the City to sell, either by lease for years or in fee simple, had reference to these lots as leased lots. The Record does not justify this inference. The City would sometimes really lease other property. Under their contention the Act of 1823 was unnecessary.

(*f*) We notice hereafter the meaning of the references in some of the Mayors' Reports, put in by Plaintiffs in Error, which mention this property as a part of the City domain.

Other facts that may be regarded by the Court as material are noticed hereafter in this brief.

PROPOSITIONS OF LAW.

We submit that no case is made in the Record for the cognizance of this Court, because no mention is made any where in the pleading of the Constitution of the United States. The contention is that the taxation of this property by the City of Savannah violates what is alleged to be a contract and is "unconstitutional," but, so far as we can discover, the Constitution of the United

States is not mentioned except in the writ of error.

Revised Statutes, §709.

Oxley Stave Co. vs. Butler Co., 163 U. S., 648, 653.

Kipley vs. Illinois, 170 U. S., 186, 187.

It is true that the Supreme Court of Georgia discusses the claim made by Plaintiffs in Error that this property is exempt from taxation by contract, the decisions of this Court bearing upon the right of a State to make such a contract and the necessity of showing an express contract, but the Federal Constitution is mentioned for the first time in the writ of error; and this is not sufficient.

Butler vs. Gage, 138 U. S. 52.

The bare averment of a Federal question is not sufficient to confer jurisdiction. In any event it must be plainly shown by Plaintiffs in Error that an express and valid contract of perpetual exemption from taxation was made, the obligation of which the municipal authorities, under legislative power, were endeavoring to impair.

New Orleans vs. New Orleans Waterworks Co. 142 U. S. 79.

The Supreme Court of Georgia has held in this case that there was no room whatever for the contention that a contract had been shown, even if the municipal authorities of Savannah had been clothed with the power to make a perpetual contract of exemption, and that the only one shown, that contained in the deed, which must govern, provided clearly and specifically for municipal taxation. (Pages 70 et seq. of the record.)

If this Court does not feel authorized to set aside this finding of the Supreme Court of Georgia on the proof submitted, it will not take any cognizance of this case.

Dibble vs. Billingham Bay Land Co. 163 U. S. 63.

N. O. Co. v. N. O. 143 U. S. 195

The foregoing general proposition is also incidentally involved in the contentions following :

No act of the Legislature of Georgia has ever been passed which refers to the taxation of this property, directly or indirectly, or which undertakes to confer upon the City of Savannah any specific authority with reference thereto. We claim not only that the power exists but that its exercise is mandatory. The power, however, comes from the broad and general language in our local law as to taxation.

Since the adoption of the first Code of Georgia, that which went into effect January 1, 1863, the taxing power of the City of Savannah is contained in the following provision: "They" (referring to the Mayor and Aldermen of the City) "are also hereby vested with full power and authority to make such assessments and lay such taxes on the inhabitants of said City and those who hold taxable property within the same, and those who transact or offer to transact business therein, as said corporate authorities may deem expedient for the safety, benefit, convenience and advantage of said City, and may enforce the payment of such assessments and taxes in such manner as said Mayor and Aldermen may prescribe. Besides real and personal property, the said Mayor and Aldermen may tax capital invested in said City, stocks in money corporations, choses in action, income and commissions derived from the pursuit of any profession, faculty, trade or calling, dividends, bank, insurance, express and other agencies, and all other property or sources of profit not expressly prohibited or exempt by State law, or competent authority of the United States."

Code of 1863, §4756; Code of 1882, §4847.

Under this broad grant of power the ordinance assailed in the case at bar has been passed. It clearly covers the taxation of this property, as much so as if it were specifically mentioned, no matter what may be thought of the character of the estate enjoyed by the holders.

No power in the City of Savannah to make the contract

There has never been in the City of Savannah, even prior to the adoption of the present Constitution, any power which authorizes the City to make ~~such~~ a contract of perpetual exemption from taxation.

No act of the Legislature of Georgia has been cited which shows, or suggests, its purpose to give this extraordinary power to the City of Savannah to barter away, perpetually, its right of taxation, to sell its very life-blood. In the absence of such legislative authority, the contract, if it had been made, would have been void. (Augusta Factory vs. City Council of Augusta, 83 Ga. 734. and the two cases cited therein with approval; Burroughs on Taxation, page 374; 1 Desty on Taxation, pages 127 and 129.) The case of Mack against Jones, 21 New Hamp.,* cited with approval in 83 Ga., is one where the property was conveyed by the city, and the grantor's deed contained an assurance of exemption from municipal taxation; and yet this contract was held to be void. See also N. O. Co. v. N. O. 143 U.S. 195

A void contract could, of course, not be ratified and confirmed, even if an effort of this character had ever been made, which is not shown.

California Bank vs. Kennedy, 167 U. S. 370, 371.

No authority can be cited which applies the principle of estoppel so as to deprive a State or city of the power of taxation by any means short of an express and direct contract upon sufficient consideration. It would be remarkable if a municipality were estopped as to this sovereign right by the declarations of a City Marshal, whether Aldermen were present or not. Those declarations, if made, amount to nothing more than a recognition of the fact of exemption, and were made, doubtless, because the property was then exempt *under and by virtue of the tax ordinances then in force.*

By reference to page 50 of the Record it will appear that some form of expression was always used in the

* Note. In Mack v. Jones, the paper was termed a "lease" and only the possession was conveyed.

tax ordinances, certainly from 1806, which in some way embodied the policy of the City of Savannah to exempt this class of property from municipal taxation. By reference to pages 8 and 9 of the brief for Plaintiffs in Error it appears that they admit this in terms. As stated on the latter page "in one form or another every tax ordinance admitted an exemption of leased lots or City lots from taxation." Prior to the adoption of the present Constitution the City of Savannah was not bound to tax all property, and could, *by ordinance*, exempt property from taxation, not as a matter of contract, but as a matter of municipal will, subject, of course, to the repeal of the ordinance at any time that the municipal authorities saw fit.

Waring vs. Savannah, 60 Ga., 93.

Augusta Factory vs. City Council, 83 Ga., 734.

But as held by the Supreme Court of Georgia when this case was before it on exceptions to the refusal of an interlocutory injunction, "whatever the expectation of purchasers or the unbroken practice of the City hitherto may have been, the mandate of the Constitution of 1877 is to tax all property save that expressly exempted by the Legislature under Constitutional authority, if any is taxed. That this mandate may have hitherto been disregarded is no reason why it should not be obeyed now."

Wells vs. Mayor and Aldermen of Savannah, 87 Ga., 401 and 402.

The passage of these ordinances from time to time, instead of strengthening the contention that a contract existed, suggests that it must have been understood that there was no contract upon which the exemption could be predicated, and that municipal legislation providing for the exemption of this class of property was essential to the accomplishment of this end.

The statements in the Mayor's reports merely recognize the fact of exemption. They were made to up-

hold the city's credit. There is not a word of evidence to show that they were intended to induce the purchase of this property. There is nothing to show that any one of these plaintiffs ever saw one of these reports before this litigation. A fair illustration of the purport of these reports can be found on page 51 of the Record, where the then Mayor—Mr. Screven—in making a statement as to the city's assets, includes these lots, but clearly at their value to the holders of the property. The city's claim, admittedly, would be extinguished by the payment of the balance of purchase money, which was comparatively small, and this was the city's real interest. While these lots were sometimes called "City Lots," it will not be disputed that at least a very large interest went out of the city and that the holders held, in any event, a perpetual lease, which they could sell, give away, devise, exercise absolute dominion over, and that they could at any time settle with the city by paying the balance of purchase money, which was frequently small.

The only reference outside of the deeds themselves in this entire record to a contract of exemption from taxation, express or implied, and the only scrap of evidence put in wherein words of this kind are used is to be found on page 56, and is contained in a report made January 17, 1872, wherein it is stated that "the reason why the City lots are not taxed beyond the ground rent is that the City is *understood* to have bound itself not to tax them * * * * It is of no moment that the stipulation does not appear in the deeds, the ordinances contain the real terms of the contracts and control the deeds, whenever the latter depart from or conflict with them. And as the City has never taxed such lots, it is difficult to resist the conclusion that such was the design when the ordinance of 1790 was framed."

If it were possible to bind a municipality perpetually by an estoppel on account of declarations of officers, in

any event it would be necessary for the Plaintiffs in Error to show that they in some way acted upon these assurances and that they did not afterwards, by accepting the deeds, surrender the rights that accrued to them under such assurances.

In this very case the Supreme Court of Georgia significantly says, after noticing that the effort to create a contract by such proof is simply an attempt to engraft upon a written instrument by parol a stipulation contrary to the terms of the writing itself: "Besides all this, we fail to find in the record any testimony showing that these particular plaintiffs, or any of their predecessors in title, bought any of the lots in question under the impression that the same would be exempt from taxes. Indeed, it is not shown that any of these lots were purchased at a sale at which the Marshal made such an announcement as that above referred to. The evidence simply goes to the extent of showing what was his custom in this particular, and what was the general impression of the public in regard to the matter. For aught that appears, those who actually bought at these sales were fully advised as to the truth with reference thereto, if not prior to the sale, at least before they complied with their bids and accepted the city's conveyance of the lots purchased by them." (Pages 71 and 72 of Record.)

The special attention of the Court is called to the fact that no one of these Plaintiffs in Error has testified in this case; that they offer no evidence at all as to when, or under what circumstances they bought the property held by them, or to suggest that when the Marshal sold *their property*, or any of it, any statement was made which could be invoked to raise an estoppel, much less an express contract. They claimed to be holders of the lots mentioned, and the answer admits that they are, but as to when they bought, from whom, under what

circumstances or under what impression, the proof is absolutely silent, although the answer asks for this information. (Page 13 of Record). There is nothing to indicate that any one of them ever saw this report on page 56, or any action of any kind by Council touching these lots, or ever heard of a statement made by a Marshal prior to this litigation. So far as the proof shows to the contrary, all of them may have purchased their lots after the passage by the City of Savannah of the ordinance of 1889, upon which the executions are based.

The oral testimony, to be found on pages 57 et seq. of the Record (most of which is clearly incompetent because it undertakes to vary the deed and to express opinions and conclusions) does not refer in any way to any property held by these Plaintiffs in Error, or connect any one of them with any of the matters referred to.

We submit that the Supreme Court of Georgia is clearly right in holding that there was not only an entire absence of evidence going to show that the City of Savannah ever contemplated making a contract of exemption, but that on the contrary the deed itself plainly and specifically reserves the right of taxation. (Pages 70 and 71 of the Record).

The parties to it agree that the property shall be subject to "*such assessments and burthens as shall be in common with other lot holders in the said City.*" This was put in *ex industria*, so as to avoid all questions on this point. (Page 20 of Record, latter part).

The covenant could not have been designed to provide that these holders should save the City from State and County taxes. At the time it was used, as fully appears in the Gibbons case hereinafter referred to (Charlton's Reports, page 113) the property of the City of Savannah was not subject to such taxation and never had been.

It has not been even since the adoption of the present Constitution.

Trustees vs. Bohler Tax Collector, 80 Ga., 163.

We do not lose sight of the fact that in 1856 the Legislature passed an Act providing that "from and after the passage of this Act the City of Savannah shall be exempt from taxation upon certain property known as the Springfield Plantation, now embraced within the corporate limits of said City." (Acts of 1855–6, page 546.) (These are the lots leased by the City of Savannah for a definite period of twenty-four years under the form of lease set out on pages 21 et seq. of the Record.) But this Act was unnecessary. The decisions of our Courts show that such property was exempt without the Act. As said by the Supreme Court of Georgia in the case of Savannah vs. Grayson, in noticing the point that the City could not be presumed to possess a power previous to the enactment of the Statute conferring it, "it not infrequently happens that a Statute is, in effect, simply declaratory of what was already existing law." (104 Ga., 115, 116).

Status of this property settled in Gibbons case

The Gibbons case dealt with lots eight and nine in Franklin Ward, and the status of the title to these lots. By reference to Exhibit A of the bill, on page 9 of the Record, it will appear that the Plaintiffs in Error, Charles M. and John H. Gilbert, are the owners of lot eight. In that case it is expressly recognized that if the title to these lots is in the City of Savannah they would not be subject to State and County taxation, and that the liability to such taxation turned upon the question as to whether the city was the landlord and the grantees only the city's tenants. The Court finds that if the grantees are the city's tenants, then this property cannot be subjected to either State or County taxation. In the report of a Committee of Council, put in evidence by Plaintiffs in Error, to be found on page 56 and already noticed, it is stated by the Committee that they "find it unneces-

sary to consider the nature of the estate vested in the purchaser of such a lot. *That subject seems to have been fully disposed of by a decision made in the Superior Court of Chatham County in January 1807, which, so far as your Committee are informed, has ever since been accepted as settling the law of the case.*" The decision referred to is that in the Gibbons case, which was decided at the January term 1807 of Chatham Superior Court, before the organization of the Supreme Court of the State, and, as already noticed, is to be found on pages 113 et seq. of the reports known as Charlton's Reports. In the light of this decision there could be no possible reason for the insertion of these words in order to settle the rights of the grantor and grantee so far as State and County taxation were concerned. The bulk of this character of property was sold by the city after this decision. The Plaintiffs in Error have, of course, purchased since. The greater part of that mentioned on Page 9 of the Record, (Exhibit A of the Bill) was sold by the city after this decision was made. (Further as to character of these holdings, see p. 15 et seq.

The Supreme Court of Georgia is clearly right in holding, as it does in this case, that the construction attempted is inconsistent with the writing. It would interpolate words which change the manifest meaning of the covenant. It is utterly opposed, too, to its accepted and continued construction. Plaintiffs in Error admit their liability for all other "burthens," but undertake to deny their liability for this, the main burthen.

The words are not only too broad to be restricted, as contended for by Plaintiffs in Error, but they have special reference to municipal taxation. They are a part of a covenant between the city and its grantee. The grantee, his heirs, executors, administrators and assigns are assured in this deed that as long as the ground rent is paid, the property shall be held and enjoyed perpetually "without the let, suit, trouble, eviction or denial of the corporation," but out of an abundance of caution

(although we submit the right of taxation would have been retained without the stipulation), the grantor (as it was supported by property *in* the city) stipulated that the lot holders should be subject to the assessments and burthens in common with other lot holders "in the said city," whose lots, because of their location, were subject to municipal burthens. The city, in its verified answer, states that when this covenant was first employed there were no assessments or burdens upon the lot holders of the City of Savannah, save only ordinary taxation, and that assessments for sidewalks and street improvements were of a much later day, and no effort was made to show the contrary of this. (Page 18 of Record.) This fact alone would make clear the meaning of the words when incorporated in the deed, if there is any obscurity about them.

At the time of their first use the City's enabling act, that which alone gave it authority to tax, employed the word "assessment" and did not use the word "tax." This is the Act of February 10, 1787, to be found in the Digest of Georgia laws commonly known as Watkins' Digest and on page 354. It is an "Act for better regulating the Town of Savannah and the Hamlet thereof," and in section 4 it is provided "That it shall and may be lawful for said wardens" (they were the predecessors of the present Mayor and Aldermen), "or a majority of them, yearly and every year or oftener, if occasion may require, to make, lay and *assess* one or more rate or rates, *assessment* or *assessments* upon all and every person or persons who do or shall inhabit, hold, use or occupy, possess or enjoy any lot, ground, house or place, building tenement or hereditaments in any square, street or place within the limits of the Town of Savannah or Hamlets as aforesaid, for raising such sum or sums of money as the said wardens, or a majority of them, shall, in their discretion, judge necessary for and towards carrying this Act into execution; and in case of refusal or neglect to pay such rate and assessment, the same

shall be levied," etc. This act was subsequently held to authorize a tax upon lots of ground or buildings within the city, or upon persons, with respect to this species of property by reason of their owning, occupying or inhabiting the same.

Savannah vs. Hartridge, 8 Ga., 27.

As stated by the Supreme Court of Georgia in this case, "the term assessment" is often used as a synonym of taxes. Indeed, one of the definitions of this term given by Webster is a tax. But even if this word, as used in the deed, does not necessarily refer to taxation, the word "burthen," which is therein employed, is certainly sufficiently comprehensive to include municipal taxes. Taken altogether, the language adopted is clearly broad enough to embrace every burden then existing, or which might thereafter be lawfully imposed upon other land owners in the city. The deed was signed by both parties. *Here, then, is a specific written agreement made between the parties to the contract relating to the sale of property by the city, whereby it is expressly declared that the property shall be held by the purchaser (and of course by his assigns), subject to any burden which might be borne in common by the holders of other lots in the city, necessarily including that of municipal taxation.* (Pages 70 and 71 of the Record.)

The word "assessment" has always been construed in Georgia to cover ordinary taxation.

See Frederick et al. vs. Augusta, 5 Ga. 561 (2).
Home Insurance Co. vs. Augusta, 50 Ga. 539.
Savannah, T. & I. of H. Ry. of Savannah vs. Mayor, &c., of Savannah, 37 S. E. R. page 394.

At the present time, when a distinction is sometimes made between ordinary taxation and what is generally called an assessment for street improvements, it is held that the former is made against the owner of the property and the latter against the property itself. As said by the Supreme Court of Georgia, in Hayden vs. City

of Atlanta, 70 Ga. 823, citing a large number of decisions from other States, "Taxes are imposed on the person, assessments are imposed on the property." In the case at bar the deed always used refers to the assessments and burthens of other "lot holders."

It would seem clear, therefore, even if a Marshal or other City Official, had been authorized to agree that the city would not tax this property and had so agreed in terms, undertaking to bind all the governing bodies of the City of Savannah, for all time to come, that when the purchaser subsequently became a party to this deed, with this covenant, he expressly surrendered whatever rights he might have had under this assurance from the official, and all claims thereafter made of exemption by contract would be in the very teeth of the writing. In the case of the Providence Bank vs. Billings, 4 Peters, 562–3; this Court, through Chief Justice Marshall say, of a claim of exemption from taxation, "we must look for the exemption in the language of the instrument, and if we do not find it there, it would be going very far to insert it by construction." Here we are asked not only to insert it by construction but much more than this, to change the words of the writing and vary it by a most unnatural and unreasonable construction for which no reason at all has been, or can be, given.

Since the use of the words just quoted from this Court all Courts have become more and more reluctant to recognize the contract set up even when expressed. They will certainly not make one for the parties., particularly against the terms of the express covenant.

The decision in Tucker vs. Ferguson, 22 Wall, 575, quoted by our Supreme Court in this case and followed (page 70 of the record), has never been varied or departed from.

Laws undertaking to exempt property for any definite time, or perpetually even, if originally valid, and they

had been shown in this case, do not, as a general proposition, tie up the hands of subsequent legislatures. They are usually mere bounty laws, subject to repeal at any time. They have been so held frequently when acted on and when investments have been made upon assurances clearly implied in them and when their repeal seemed to work a great injustice, if not involve bad faith.

See Christ Church of Philadelphia vs. City of Philadelphia, 24 Howard, 300.
Welch vs. Cook, 97 U. S., 541, 542, et seq.
Fertilizing Co. vs. Hyde Park, 97 U. S., 666.
Vicksburg Railroad Co. vs. Dennis, 116 U. S., 667, 668.

The case of Welch vs. Cook is a very strong one. The petition for injunction stated a very strong case for equitable relief. If a contract of exemption could ever be implied it ought to have been in that case. The judgment dismissing the case on demurrer was unanimously sustained.

A delay or failure to tax, no matter how long continued, cannot destroy or impair the right of taxation. This right is never lost by non-user or barred by prescription. (Railroad vs. Dennis, 116 U. S., 665; Wells against Savannah, 87 Ga., 401-2; the decision of the Supreme Court of Georgia, in this case, on page 71 of the record.)

Plaintiffs in Error allude in their brief to custom and usage. Even if they were right as to the facts, which we deny, (the record, we insisting, showing only that these holdings were exempt from municipal taxation because, and only because of ordinances which so provide), we need only say that no evidence as to usage, custom or anything else can add to, vary or contradict a writing. As said by this Court in National Bank vs. Burkhart, 100 U. S., 692: "A general usage may be proven in proper cases to remove ambiguities and uncertainties in a contract, or to annex incidents, but it

cannot destroy, contradict, or modify, what is otherwise manifest. Where the intent and meaning of the parties are clear, evidence of a usage to the contrary is irrelevant and unavailing. Usage cannot make a contract, where there is none, nor prevent the effect of the settled rules of law." In Tully vs. The County of Cook, 103 U. S., 162, it is said that "in all cases where evidence of usage is received, the rule must be taken with this qualification, that the evidence be not repugnant to or inconsistent with the contract."

We repeat, however, that we fail to find any evidence in the record of usage, custom or anything else which justifies the inference that the City of Savannah ever regarded this property as exempted by virtue of any contract or understanding.

If Hills in Error were lessees, they would be liable for taxes.

We submit that if the deed now before the Court were silent on the subject of taxation, this right would belong to the City, even if the City had been authorized to surrender it and the deed had characterized the lot holders as the City's tenant's, expressing in terms the purpose to create the relation of landlord and tenant. We do not think a case can be found which justifies the position that a landlord, as between himself and the tenant, must bear this burden, where the lease is longer than the probable life tenure, say for ninety-nine years. The tenant for life pays the taxes, although in ordinary tenancy, where the terms are within the probable duration of human life, the tenant does not do this. The reason for the rule applies with special force where the lease is for a longer term, and where the so-called tenant is, practically and substantially, the real owner of the property. As said by Mr. Taylor in his note to Section 341 of his work on Landlord and Tenant: "The rule applies only where the estate is for years. A tenant for life is bound for taxes and similar annual burdens." Here, the lot-holders hold admittedly not only for life,

but perpetually. They hold as long, as fully and as absolutely, as the ordinary owner in absolute fee simple, subject only to the claim of the City for the balance of the original purchase money, with the option in them to pay up the balance and thus stop the interest, but with no right in the City to require such payment.

In Davidson vs. Westchester Gas Light Co., 99 N. Y., 559, 568 and 569, the Court holds in terms that the usual incidents of landlord and tenant do not apply where the lessee is to all intents and purposes really the owner, "that the rule fails with its reason."

In Sanderson vs. the City of Scranton, 105 Penn. St. 469, 472 and 473, while the paper was designated by the parties to be a lease and used the terms appropriate thereto, and was, according to its literalism, a perpetual lease, the Court holds concerning the liability of the alleged lessee for taxes, as follows: "The liability of the owner of coal or mineral *in place* for taxes levied thereon results *from the nature of his estate or interest*, and, therefore, he is not relieved from responsibility on the principle *inclusio unius est exclusio alterius*, by an express covenant in the instrument of severance that he shall pay taxes levied on the coal *mined* without recourse to the lessor to refund the same." (Italics ours.) In this case it was held that the lessee was liable for the tax on the *unmined* coal, although it might, with reason, have been contended that by implication the conveyance released him from this. This case goes farther than it would be necessary for us to go, if the conveyance in the case at bar were silent as to assessments and burdens.

See Railroad vs. Sandison, 109 Penn. St. 583, which is to the same effect. Both of these cases are very much in point as to several features of the case at bar.

In Brainard vs. the town of Colechester, 31 Conn. 407, the Court holds that where a lease is made for nine hundred and ninety-nine years, the alleged lessee holds practically, for all substantial purposes, a conveyance in absolute fee simple. To same effect, see Wells v. Savannah, 87 Ga., 399, 400, and some of the citations on page 19 of this brief.

Under the Constitution of the State of Georgia it is the duty of the municipal authorities of Savannah to tax all property except that exempt by the Constitution. These exemptions are strictly construed, and the mandate of the fundamental law applies as completely to municipalities as it does to the Legislature of the State.

See the provisions of the Constitution of the State of Georgia to be found in Sections 5084 and 5086 of the present Code of Georgia, commonly known as the code of 1895;
Wells, et al. vs. Savannah, 87, Ga., 401–402.
McLendon vs. LaGrange, 107, Ga., 356.

The power of the City of Savannah is very broad. It is found in Section 4847 of the Code of 1882. Its fullness is noticed by the Supreme Court of Georgia in Savannah vs. Crawford & Lovell, 75 Ga., 35 and 38, (which deals with the defense of an exemption by contract,) and in the recent case of the Street Railroad Co. vs. Savannah, 37, S. E. R. page 393.

In November 1889, just a month before the passage of the ordinance now before the Court, the Legislature of Georgia passed an act which was merely declaratory of the law as it was previous to its passage. It provides "that all persons owning any mineral or timber interests or any other interest or claim in or to lands *less than the fee* shall be and they are hereby required to return the same for taxation, and to pay taxes on the same *as on other property.*" (Georgia Laws for 1889, p. 35.) It is found in the first volume of the present Code of Georgia, Section 768.

The Supreme Court of Georgia was clearly right in holding as it did, when this case between these parties was before it on exceptions to the refusal of an inter-

locutory injunction, that the property of these Plaintiffs in Error was subject to municipal taxation whether they hold the fee or under perpetual lease. We do not see any escape from the conclusions and the reasoning of the Supreme Court of Georgia, as announced by Mr Chief Justice Bleckley, on pages 398 et seq. of 87 Ga. The Court found nothing debatable about the question. It seemed too plain for argument. It even wondered how learned and astute counsel could raise the question.

The bill of these Plaintiffs in Error in this case does not in any way put in issue the statement in the City's answer to the effect that the property is justly and clearly assessed for taxation, *held as it is.* They claim only that the municipal authorities have "caused the said lots of your petitioners to be assessed at a valuation greatly in excess of the valuation money mentioned *in the original conveyance of lease,*" (page 6 of the Record), but they do not allege, or attempt in any way to show, that the assessment is in any case in excess of what they could now sell out for, the purchaser stepping into their shoes, acquiring all their rights and assuming their obligation. Why then is not this property clearly subject to taxation, even if the estate enjoyed be less, only a leasehold interest? They call it in the Bill "a perpetual lease." (Page 3 of Record.) Under the authorities cited, the lessees of such leases are practically and substantially the owners of the property, and are subject to all the burdens of owners, including the payment of taxes.

It is, of course, not necessary that a man have any title to property in order to be obliged to pay its taxes. The possession of lands under a bond for titles, although no part of the purchase money be paid, involves responsibility for its taxation, and, as between the party in possession and his obligor, the former is the proper one to pay. See National Bank of Athens vs. Danforth, 80 Ga., 64.

+ Not even the Ga. Courts could look into the question of valuation even if it were raised. Augusta v. Pierce, 79 Ga. 78.

The fact that the interest may be purchased from the City is immaterial. A State or municipality may sell land, or any interest in it, for cash, or on time, and the property purchased is just as subject to taxation as if it had been bought from some third party. The fact that all the purchase money is not paid is of no consequence. Suppose the City should sell any property to A on time, either with or without a part payment of the purchase money, and suppose A were to take a deed and the City a purchase money mortgage, it would not be claimed that A was not subject to municipal taxation on this property. In the case at bar it will be conceded that as soon as the balance of the purchase money (which in many cases of these lots, now very valuable, is very small) is paid, the lots involved become immediately taxable by the City. (Robertson vs. Land Commissioner, 44 Mich., 275 and 276;* The Hudson Tunnel Co. vs. The Board of Riparian Commissioners, 27 N. J., Eq. 573.)

Plaintiffs in Error are not Lessees

In view of the fact that no question is made by the pleading or the proof as to the justice of the valuations placed upon these holdings for taxation, and this matter would not be considered by this Court in any event, we apprehend that the Court will not go into this question. As Plaintiffs in Error seem to think that the character of the title bears upon their main contention as to contractual rights, we proceed to submit that the deed conveyed a freehold of inheritance, to be defeated upon the non-performance of a condition subsequent. The brief of Mr. Attorney General Charlton in the Gibbons case seem to be conclusive. The report of the decision of the Court on page 121 of Charlton's Reports states "That the Judge in his charge to the special jury repeated the law as it had been cited by Mr. Attorney General and then left it to the jury, according to the judicial system, to determine whether Mr. Thomas Gib-

* Judge Cooley's remarks in 44 Mich. 275, are very apposite

bons was the lessee of the corporation or whether the deed did not create a freehold estate of inheritance. If the latter estate was created, the lots were certainly subject to the State taxation."

In addition to the authorities cited in ~~this~~ the brief in the the Gibbons case, the Court, should it find it necessary to consider this question, is referred to the following authorities:

2 Blackstone's Coms. M. P.'s 105, 106, 109, 110; 139 et seq.; 4 Kent's Coms. M. P.'s 5, 6 and 9; Irwin vs. Banks, 1 Penn. St. R. (Barr) 349; Krider vs. Lafferty, 1 Wharton (Penn.) 303(5), 314, 315; Sahl vs. Wright's Exrs., 6 Pa. St. (Barr) 433; Sanderson vs. the City of Scranton, 105 Pa. St. 469, 472-3; R. R. Co. vs. Sanderson, 109 Pa. St. 583; Saunders vs. Hanes, 44 N. Y. (5 Hand) 353-4, 358 et seq; Carter vs. Burr, 39 Barbour 59, 65; St. Paul's Church in Syracuse vs. Ford, et al., 34 Barb. 16; Davidson vs. Westchester Gas Light Co., 99 N. Y. 559-60, 568-9; Bridge vs. Wellington, 1 Mass. 219; 9 Allen 159 and 167; Feofees of the Grammar School in Ipswick vs. Andrews, 8 Metc. 584; Alexander vs. Warrand, 17 Mo. (2 Bennett) 228; McMurphey vs. Minot, 4 N. H. 254; Cole vs. Lake Co., 54 N. H., 242-3, 277; Farley vs. Craig, 11 N.J.L. (6 Halsted) 312; School District of Delhi vs. Everett, 52 Mich. 314, 317; Guy Arms vs. Burt, et al., 1 Vt. 303; Stevens vs. Dewing, 2 Vt. 411; R. R. vs. State, 60 N. H. 139; Brainard vs. the Town of Colechester, 31 Conn. 407; Cinn. College vs. Yeatman, 30 Ohio St. 286 with 277 and 8; Hudson Tunnell Co. vs. Board of Riparian Comrs., 27 N. J. Eq. (XII. C. E. Green) 573; Taylor's Landlord and Tenant, Sections 14 et seq. and 50 in connection with Sections 74, 470; Wood's Land. & Tenant, p. 106, Section 75; McAdam on Land and Tenant, 48.

Plaintiffs in Error say that the words "heirs" is not used in the *habendum* clause of this deed, and that be-

fore the act of 1821, the use of this word was necessary to the conveyance of a fee. They contend that Attorney General Charlton was in error when he stated in the Gibbons case that the "deed conveys an estate to him, his heirs and assigns, forever." In reply we submit that no authority can be produced to support the proposition that it has ever been necessary in Georgia that the *habendum* clause of a deed should contain this word, and that the Attorney General nowhere says that the *habendum* clause of this paper has this word. The fact is that the word "heirs" appears four times in the paper and it is connected with provisions looking to the enjoyment of the estate by heirs. Their enjoyment of the property is as completely provided for in the deed as is that of the grantee himself. As said in the Gibbons case "upon the demise of the ancestor the heirs take possession of the lots, by the legal operation of the deed." Some of the authorities cited by us show that the location of the words in the paper is not material. See e. g. 4 Kent's, Coms. 5 and 6; Bridge vs. Wellington, 1 Mass. 219; Saunders vs. Hanes, 44 N. Y., 358 et seq. In the last case the dissenting judge thought that the word ought to be in some way connected with a provision that the heirs may enjoy the estate granted. The deed in the case at bar fully meets this requirement. In some of the cases cited by us, while the point as to the location of the word "heirs" may not be discussed, it is held that a fee is conveyed and, yet, in point of fact, the word, heirs, is not used. The cases which hold that the word must be used recognize that the location of the word is not material. There is strong authority for the position that the rule as to the use of this word, being a feudal one, never had any application to this country. See Cole vs. Lake Company, 54 N. H. 242-3; 277 et seq.

The case of Atkinson vs. Orr, 83 Ga., 34, does not militate in any way against our construction of the deed. It merely adjudicates the rights of the parties

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under the contract before the Court. The character of the estate created was not involved. The question was as to the rights of the parties under the writing, whatever its name. The paper, too, was essentially different from that now before the Court.

Besides, many of these deeds, probably a large majority of them, have been executed by the City of Savannah since the Act of 1821, and are governed by it. According to their pleading, this is true of a majority of those specifically involved in this case. (Page 9 of the Record.) Under this Act "the word "heirs" or its equivalent is not necessary to create an absolute estate; but every conveyance properly executed shall be construed to convey a fee unless a less estate is mentioned and limited in such conveyance." (Code of Ga., Sec. 3083.)

The decisions of the Supreme Court of Georgia, arising before the taxation of this property, in Swoll vs. Oliver, 61 Ga., 248, and Laurence vs. Mayor and Aldermen of Savannah, 71 Ga., 392, fully harmonize with our contention, and their expressions sustain it, although the question of taxation of this property was not involved. In the former case, this Court recognizes, in terms, that "until re-entry the *title* was in the purchaser; that this was necessary in order to *re-invest* the City with the title," and that, therefore, before this, the title was out of the City. (61 Ga., 248, 253.) The adjudication in the Laurence case is entirely inconsistent with the idea that the City was only the landlord, because it holds that, notwithstanding the re entry, under the terms of the deed and the provision that "the estate created was determined to all intents and purposes as fully as if the same had not been bargained for or purchased," the City could re-enter only for the purpose of selling, in order to recover what might be due the City, the exact adjudication being in the following words: "The right of re-entry and re-sale was for the *purpose of securing*

the amount due the City, and after the payment of this the holder under the original grantee had an equitable claim to the balance, and a bill for the purpose of enforcing such claim was not demurrable." (Italics ours.) When a landlord lawfully re-enters upon his property, the rights of the tenant cease, either in the property or the proceeds of its subsequent sale. Under the decision in the Laurence case, the City's possession is substantially that of a vendor who holds a purchase money mortgage to secure a balance of purchase money, with power to sell upon default, the City can re-enter only for the purpose of collecting its debt, and the excess goes to the original purchaser or his assigns. The Court, through Judge Hall, calls the City's grantee the *feofee* thus showing his appreciation of his status. Both cases contain expressions showing clearly that the Supreme Court of Georgia understood that the title had passed out of the City. In the Laurence case the Court properly say (71 Ga., 396): "In Swoll vs. Oliver, 61 Ga., 248, this Court determined that 'where the City, by its proper officer, posted a notice of re-entry on the lot according to the terms of the deed, such act would constitute a re-entry thereon, and after the expiration of ten days would defeat the title of the purchaser.'" (Wells v. Savannah 87 Ga. 401.)

There is nothing said in the ordinances providing for sales of property on this plan about a lease. Such ordinances do not anywhere call these papers leases. The lots are to be "sold;" the highest bidder "Shall be deemed the purchaser of the lot then under sale;" it is to be "in the power of such purchasers, or their heirs and assigns, to pay in the said valuation money;" "a deed by way of bargain and sale is to be made," and then the ordinance provides as follows, (page 29 of the Record): "And the said bargain and sale shall vest either an absolute or conditional estate in the purchaser according to circumstances; that is to say, an absolute

one if the valuation money shall be paid down, or a conditional one if the said valuation money shall not be paid down, this latter also to become absolute if, and when said-valuation money shall at any future time be paid into the treasury and an acknowledgement thereof under the seal of the City, signed by the Mayor and a majority of the Aldermen for the time being, and attested by the City Treasurer, shall be endorsed on such deed." It is true that immediately after this appear the words "use and occupation" stressed by Plaintiffs in Error, but they cannot have any special significance in view of their context; they certainly cannot control the meaning of the entire ordinance, or the deed subsequently entered into by the parties. Immediately after them, the ordinance provides that upon a failure by a purchaser, or those claiming under him to pay groundrent for fifteen days, "the said premises are to *revert* to the corporation, who shall immediately thereafter possess the power of re-entry, and having, by means of their proper officer, exercised such power and given a proper notice thereof in writing posted on the premises, the lot or lots so entered upon, with all improvements thereon, are to be considered at the expiration of ten days thereafter as absolutely *revested* in the corporation," etc.

It is not denied that in point of fact the purchasers of these lots, and their heirs and assigns, have always had (subject to the City's right to what is called ground rent and its remedy for its collection) the absolute and complete use, occupation, enjoyment and control of this property, with as ample and complete dominion over it as could be incident to any property held in absolute fee simple. This is the necessary legal effect, as well as the practical and universal construction of the effect of these deeds, and the words "use and occupation" have not impaired or affected this practical result and were not so designed. The ordinance in its entirety, as does the

deed, shows that the purchaser's rights were not to be confined to a mere use and occupation (although, of course, he had these completely, just as the owner of a fee simple estate has) but were to include a full and complete ownership and dominion over the property, subject to the City's claim, which is, we repeat, substantially that of a vendor who holds a purchase money mortgage, vesting in him the right to sell upon default at public outcry for the purpose of collecting his claim, a right frequently given in mortgages.

While the interest on the purchase money withheld is called a "ground rent," it is really and necessarily interest. As said by Mr. Bouvier in his Law Dictionary "rent is a return or compensation for the possession of some corporeal inheritance, and is a certain profit, either in money, provisions, or labor, issuing out of lands and tenements, in return for their use." Prof. Minor, in the second volume of his Institutes, page 34, declares that "compensation for the land that passes is the crowning characteristic of a proper rent." In the case at bar the plan in substance was to sell the lots upon a minimum price to the party or parties that bid the highest increase money, and the purchaser had the option to pay in full, or to pay a part of the purchase money and hold the balance at a rate of interest fixed in the different ordinances, generally five or six per cent. This per cent, called frequently "ground rent" was the compensation paid by the debtor to his creditor in recompense for a detention of the debt. The amount to be paid was not dependent in any way upon the value of the holding, or its rental value, or upon the value of its use and occupation, but entirely upon the amount of purchase money withheld. If, for example, the lot sold originally for $500 and the purchaser paid $100, held the balance upon an agreement to pay the city for the use of this balance

at a rate of five per cent. per annum on $400, and the lot should afterwards become extremely valuable, worth $50,000 or more, and its rental value be worth a good many thousand dollars a year to the holder, he would not pay the city more than this interest on $400, or $20 a year in four quarterly payments.

There is evidence in the Record to suggest that this plan, when the population of the City and its needs were very small, was a favored one, and that the City preferred to have a part of the purchase money held under this plan and thus establish a permanent fund for the support of the Government. It preferred doubtless that the holders should not pay up this balance and thus stop the interest on the money. This may be the reason why the yearly tax ordinances provided that the property should not be taxed.

In point of fact, some of the city's ordinances designated this alleged ground rent as interest. There is one, for example, passed in Council March 13, 1851, and to be found on pages 117 and 118 of a Digest of the Ordinances of the City of Savannah, commonly called Henry's Digest. The body of it shows that it provided for the sales of the lots in LaFayette and Troup wards, forming these wards out of the domain to be sold under this ordinance. It provides for the sale under the general plan pursued, and Section 3 of the Ordinance provides as follows: "That the said lots, the laying off whereof is above provided for, to be valued and sold in the usual manner, under the direction of the Committee on Public Sales and City Lots, at such time or times as to said Committee shall appear expedient and proper; the terms of sale to be twenty (20) per cent. cash on the aggregate of valuation and increase money, and *interest* on the balance of purchase money, to be payable quarterly at the city treasury at the rate of six per cent. per annum, with the privilege to the purchaser, his or her

heirs, executors, or administrators or assigns of paying into the treasury the balance remaining unpaid of the purchase money and all *interest* due thereon up to the time of said payment, receiving after such payment a fee simple title." By reference to Exhibit "A," on page 9 of the Record, it will appear that three of the ten Plaintiffs in Error in the case at bar now own lots sold by the city under this ordinance. Mr. Wells appears to own lot 37, LaFayette Ward, sold by the city April 22, 1851, and 30 Troup Ward, sold November 10, 1851; that Mr. Blun owns 10 Troup Ward, sold by the city March 5, 1853, and that Mrs. Douglass owns a part of lot 40, LaFayette Ward, sold by the city April 24, 1853. Another Ordinance, to be found on pages 137 and 138, is to the same effect, using the word interest instead of ground rent. We are aware that defendants introduced no evidence; but, under the charter of the City of Savannah, as recognized by our Supreme Court, judicial cognizance is taken of our ordinances, just if as they were acts of the Legislature. Code of 1882 Sec. 4872,

Collins vs. Russell, 107 Ga. 432. (Middle of page).

Our Supreme Court could consider these ordinances, whether in the record or not. See also those cited on p. 7 of Reply Brief of Plffs in Error.

The Springfield Plantation lots, held under the form of lease set out on pages 21 et seq. of the Record, are not involved in this case. They were leases for twenty-four years, that is, for a definite term. The language employed to convey the interest is "have demised, let and to farm let and by these presence do demise, let and to farm let unto the said.....his heirs, executors, administrators and assigns."

The form of the deed conveying the property involved in the case at bar uses the words "have bargained and sold and by these presents do bargain and sell," etc. These Springfield Plantation leases omit also the words

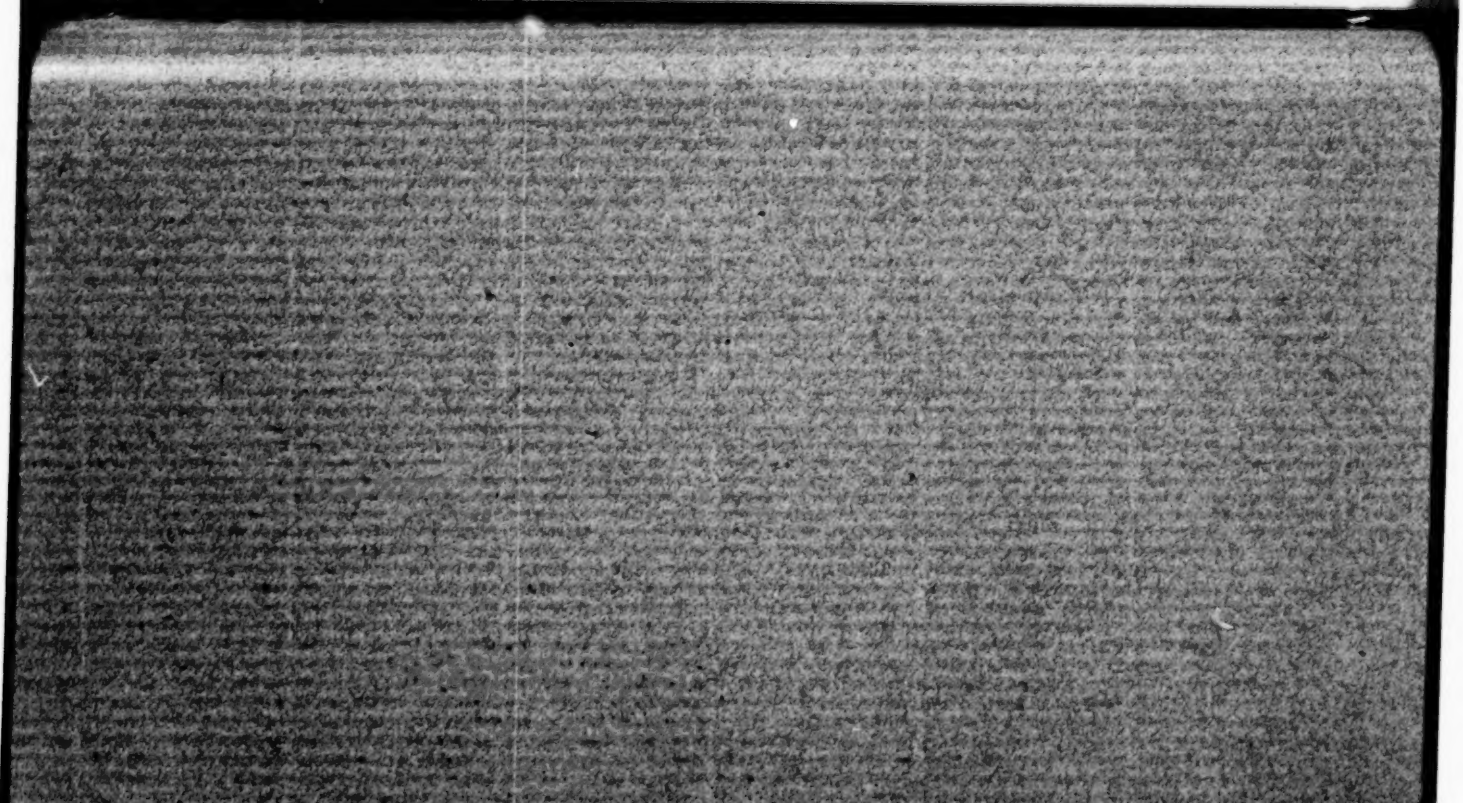
"subject only to such assessments and burthens as shall be in common with other lot holders in the said city."

We do not notice specifically the authorities cited in the brief of Plaintiffs in Error. So far as we can discover, they do not deal with the question now before the Court. Many of them do not touch the question of taxation at all. Some deal with exemptions in charters, which, ordinarily, raise this question. We do not think a single case can be found where the doctrine of estoppel has been applied to prevent the taxation of property or where a contract of exemption has ever been implied. In all cases, where the power to exempt existed, a plain and manifest contract had to be proven, based upon sufficient consideration, and its terms had to be free from all reasonable doubt.

Respectfully submitted,

SAM'L B. ADAMS,

Attorney for Defendants in Error.



Supreme Court of the United States.

No. 222.—October Term, 1900.

David Wells et al., Plaintiffs in Error,
vs.
The Mayor and Aldermen of the City of Savannah and Robert J. Wade, City Marshal.

In error to the Supreme Court of the State of Georgia.

[May 13, 1901.]

The plaintiffs in error commenced this proceeding in the superior court of the State of Georgia, Chatham County, against the mayor, &c., of the city of Savannah and its city marshal, to enjoin the collection of taxes upon certain real estate in that city, of which they claim to be lessees from the city, and they allege that the taxes assessed upon such real estate are illegal; they also seek to recover from the city the amount of taxes theretofore paid by them on such real estate, under protest. The trial of the case resulted in a judgment for the city, which was, on appeal to the Supreme Court of the State, affirmed, and the plaintiffs have brought the case here on writ of error.

They claim that the levying and collection of the taxes referred to, under an ordinance of the city providing therefor, passed in 1878, constitute an impairment of the obligations of a contract between the city and the predecessors in title of the plaintiffs in error, made at the time the real estate was purchased, by which contract it was agreed that on the payment of a certain annual sum, called "ground rent," to the city by the holders of the real estate, it was to be forever exempt from all city taxation.

Upon the trial of the action these facts appeared: Prior to 1790 the city of Savannah owned certain lots which were called "common lots," and on September 28 of that year the common council passed an ordinance for disposing of a portion of them. Each lot, by the provisions of the ordinance, was to be valued by the city, and then put up for sale at public outcry, and the highest bidder, over and including the original valuation, was to have the lot, and if he chose to pay the whole amount of his bid in cash he was to have a deed conveying it to him in fee simple, or he might, instead of making the whole cash payment, agree with the city to pay in cash the balance of his bid over the valuation, called the increase money, and also to pay a ground rent of five per centum upon the amount of the valuation, payable quarterly, and in that event the lot might be retained in his hands or in the hands

of his heirs and assigns forever on payment of such ground rent. The ordinance further provided that at any time thereafter the purchaser or his heirs or assigns should have the power to pay the original valuation money, with what rent might be due up to that time, in full discharge and extinguishment of the ground rent, and he or they should thereupon be entitled to the land in fee simple. The city was also to give a deed by way of bargain and sale to each purchaser of lots which should vest an absolute or conditional estate in the purchaser, according to the circumstances; that is to say, an absolute one if the valuation and increase money should be paid down, or a conditional one if the valuation money should not be paid down, but which should become absolute if and when the valuation money should at any future time be paid into the treasury, which payment should be acknowledged by the mayor and a majority of the aldermen, under the seal of the city and attested by the city treasurer, to be endorsed on the deed. The ordinance continued:

"And the said conditional estates shall amount to this, that the use and occupation of the premises are forever secured to the purchaser and others claiming under him or her on payment of the ground rent, but on failure therein for the space of fifteen days after the same shall become due the said premises are to revert to the corporation, who shall immediately thereafter possess the power of re-entry, and having by means of their proper officers exercised such power and given a notice thereof in writing posted on the premises, the lot or lots so entered upon, with all improvements thereon, are to be considered at the expiration of ten days thereafter as absolutely revested in the corporation, and the conditional estate therein determined, to all intents and purposes, as fully as if the same had not been bargained for or purchased, any sale or incumbrance or other act, made or suffered by the purchaser or purchasers or others under him, her or them, to the contrary thereof in anywise notwithstanding."

Pursuant to such ordinance the lands were sold and the purchasers of many of the lots elected to hold their purchases on ground rent payable quarterly, as stated in the ordinance. Deeds were thereupon executed on the part of the city and also were signed by the respective purchasers. Lands have been sold from time to time under ordinances of substantially the same character and containing language in substance the same up to 1872, since which time conditional sales have been abandoned.

The deeds contained a provision that "In consideration of the rent to be paid, and of the several covenants and agreements to be performed, (mayor and aldermen,) have bargained and sold, and by these presents do bargain and sell, unto the said ——— ——— all that lot of land (describing it) . . . unto the said ——— ——— executors, administrators and assigns, forever, on this express condition. Nevertheless, that ——— ——— the said ——— ——— executors, and administrators and assigns," shall pay rent as covenanted; and "in case of failure herein for the space of twenty days after any of the said quarterly payments shall

become due, that then the said lot and premises shall revert to the corporation of the said city, who shall immediately thereafter possess the power of re-entry; and having, by means of their proper officers, exercised such power, and given a notice thereof in writing, posted on the premises, the said lot, with all improvements thereon, shall be considered, at the expiration of ten days thereafter, as absolutely revested in the corporation, and the estate by these presents created determined to all intents and purposes as fully as if the same had not been bargained for or purchased; any sale or incumbrance, or other act made or suffered by the said ——— ——— executors, administrators or assigns, or others under him or them, to the contrary thereof in anywise notwithstanding."

The purchaser also covenanted to pay the annual rent, and that in case of failure the city should have the lawful right of re-entry as already provided for.

The deed also contained the following provision:

"And it is hereby declared to be the true intent and meaning of these presents, and all parties to the same, that, on payment of the said ground rent, at the times and after the manner hereinbefore directed, the said ——— ——— heirs, executors, administrators and assigns, shall and may from time to time, and at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the said lot and premises, and receive and take the rents, issues and profits thereof, and of every part thereof, to ——— and ——— own use, absolutely, without the let, suit, trouble, eviction or denial of the said corporation or of any person whatsoever acting under them or by virtue of their authority, subject only to such assessments and burthens as shall be in common with other lotholders in the said city."

It was also provided in the deed that the purchaser, his heirs, executors or administrators or assigns, might at any time pay into the city treasury the valuation money and the rent then due, in full discharge and extinguishment of such rent, and in that case there should be an acknowledgment of such payment under the seal of the city, signed by the mayor and a majority of the aldermen and attested by the city clerk, and endorsed on the deed, "which shall then and from thenceforth vest an absolute estate, in fee simple, of and in the said lot and premises, in the said ——— ——— heirs and assigns to ——— and their only proper use and behoof forever." It is admitted that the same character of deed has been executed for lots sold under other sales since 1790.

Extracts from the minutes of the proceedings of the common council of the city, in regard to meetings of that body in 1790 and thereafter, were put in evidence, from which it appeared that the ordinance for the sale of these lots was induced by the fact that the expenses of the city government were more than its revenues, and these sales were provided for in the hope that the condition of the city's finances might thereby be improved. There was also put in evidence a notice of sale of lots, advertised in The

Georgia Gazette of June 13, 1799, in which were specified the terms contained in the ordinance for the sale of the lots, and the advertisement contained the statement that the "purchasers are at liberty to take a lease to him or her or his heirs and assigns forever of the lots so purchased, at a ground rent of five per cent. on the valuation," &c.

An ordinance for laying off into city lots what was called the "Springfield Plantation," and providing for the sale of the same, passed in the year 1851, was also put in evidence, which contained substantially the same plan as that provided for in the ordinance of September 28, 1790, except that the conditional sale was to be for twenty-four years only. Although the lots mentioned in the petition of the plaintiffs in error in this case are not situated within the Springfield Plantation, the ordinance and the deed thereunder regarding those lots were put in evidence for the purpose of comparison with the ordinance of 1790, and the deeds executed thereunder, in order to show that the same language, except as to the term, was used in the instrument which granted a lease for but twenty-four years as was used in the other granting a perpetual term. There were also ordinances of February 27 and July 31, 1851, put in evidence, the former of which permitted one of two or more tenants in common or joint tenants to pay his proportion of the purchase money, and, upon such payment, he should receive a deed in fee, and any lessee of a city lot might, on application, have it divided into two or more parts and receive a lease for the same; and the other ordinance provided for increasing the depth of certain lots, at an increased rent therefor, payable at the same time that the regular ground rents on these lots fell due.

A report of the mayor in 1854, to the common council, was put in evidence, in which was a statement of the resources of the city of Savannah, among which were designated 643 lots in 22 wards "under lease;" also two reports of the mayor, the one on October 31, 1855, and the other a year later, both containing similar statements as to the number of lots belonging to the city, which were "under lease," and similar reports from and including 1857, up to and including 1877, with the exception of the years 1864 and 1865, when no report was made by the mayors of the city. This class of evidence was offered for the purpose of showing that the title conveyed to the purchasers was under a lease, and that it was not a conditional estate subject to be terminated by a breach of a condition subsequent, and that the city recognized the conveyance as a lease and not in truth as a conditional estate.

On April 7, 1806, an ordinance was passed by the city council for raising a fund for the support of a "watch" in the city, which provided that a tax should be levied on property therein, "including all lots held by lease from the corporation," but on November 24, 1806, an ordinance was

passed providing "that so much of the first section of the aforesaid ordinance as imposes a tax on lots held by lease from the corporation . . . be and the same is hereby repealed."

It was admitted that every annual tax ordinance to raise revenue for the city passed by the mayor and aldermen from the above date, November 24, 1806, up to and including the ordinance of January 22, 1857, used the words "excepting lots held by lease from the corporation." On December 11, 1857, the tax ordinance provided as follows:

"SEC. 4. The following real property shall be exempt from taxation, to wit: each lot of land held at the time of the passage of this ordinance upon the payment of ground rent to the mayor and aldermen, of the class commonly called city lots."

The annual report of the mayor for the year 1871 was also put in evidence, in which the following language occurs: "It is not known to the foreign public that a very large part of the real estate in the city consists of lots sold on condition of the payment of ground rent, and are, therefore, not the subject of taxation, and are not included in the assessments."

It was also admitted that lots known as "ground rent lots" were never in fact assessed for taxation from 1790 until some time after the passage of the ordinance of May 29, 1878, and that those lots were omitted from the assessment books made 1807 and every year thereafter down to the assessment book made out in the year 1878, and that in fact no city taxes were ever levied on them until after the resolution of the common council of November 17, 1889, under which they have been for the first time assessed for city taxation for the year 1890.

It was also admitted that no taxes were in fact assessed or levied under the ordinance of April 7, 1806, above mentioned. The holders of these city lots have always paid State and county taxes and street improvements and assessments for sidewalks and all other assessments and burdens common to lot owners in the said city, except city taxes. A report of the finance committee made in 1872, and signed by the chairman, was also put in evidence, in which it was stated as follows:

"The reason why city lots are not taxed beyond the ground rent is that the city is understood to have bound itself not to tax them.

"The ordinance of 1790, which was the first to provide for the sale of lots on these terms, contains a stipulation that the purchaser of such a lot, and all claiming under him, shall have the use, &c., upon paying the ground rent. This ordinance has been followed either in terms or substance by all succeeding ordinances providing for such sale.

"It is of no moment that the stipulation does not appear in the deeds; the ordinances contain the real terms of the contracts and control the deeds whenever the latter depart from them or conflict with them. And as the city has never taxed such lots, it is difficult to resist the conclusion that such was the design when the ordinance of 1790 was framed."

The ordinance of May 29, 1878, provided that—

"Every person and corporation owning real property in said city, including improvements, shall pay a tax upon said property of two and one-half per centum of the value thereof, including ground-rent lots, except on such property as may be exempt from taxation under the laws of this State."

The city is given full power of taxation by State legislation. (Code of 1863, sec. 4756; Code of 1882, sec. 4847.)

Oral evidence was also given from which it appeared that on sales of the property under various ordinances of the same nature as that of 1790 the city marshal by whom the sales were made "would announce that so long as the lots were held under ground-rent plan they would be free from city taxes. These announcements were made under authority of the committee. And often when the bidding would lag the marshal would remind the bystanders that there was only a twenty per cent. cash payment required, and that there was no city taxes, but only an annual ground rent."

One of the witnesses, who was himself at the time of some of the sales an alderman between 1858 and 1869, stated:

"I, as a city official, in good faith, have made the statement and directed the marshal so to announce when making sales of city lots under my supervision as chairman of the committee on public sales and city lots, and under the common and universal construction of the city deeds, the absence of any reservation of a right to tax the lots sold under ground rent has always been construed as an agreement not to tax."

Another witness said that he would not say that the city of Savannah ever at any time formally agreed not to tax ground-rent lots; he did not know of any official action taken thereon by the city.

The above are substantially the facts upon which the contention of the plaintiffs in error that their lots are exempt from city taxation is founded. There is no evidence that any of them bought their lots at a sale where an announcement of exemption was made, or that they purchased them under the belief that they were forever legally exempt from all city taxation.

They also claim that the deed itself, irrespective of the above testimony, necessarily and by its terms implies a perpetual exemption from all city taxation upon the lots so long as the ground rent is paid.

Mr. Justice PECKHAM, after making the above statement of facts, delivered the opinion of the Court.

The contention on the part of the plaintiffs in error is that, in the exercise of the taxing power granted it by the legislature, the common council of the city adopted the ordinance of May, 1878, and in providing therein for the taxation of the leased lots it thereby impaired the obligation of the

contract existing between the city and the holders of that class of property, among whom are the plaintiffs in error, and the ordinance is therefore to that extent void. This contract they say is evidenced, first, by the ordinance of 1790 and the deeds executed in pursuance of its provisions; also by the minutes of the common council of the city and by subsequent proceedings of the common council; by the statements of the city officials at the time when some of the sales of the property were made; by the reports of the officials, mayors of the city and committees of the common council; by the actual omission for a hundred years—from 1790 to 1890—to tax these lots; also by ordinances similar to that of 1790 for the sale of lots, passed subsequently to that year, and by the deeds executed pursuant to such ordinances, which, it is admitted, were in substance similar to those executed under the ordinance of 1790.

Taking all the foregoing evidence into consideration, including the ordinance of 1790 and the deeds executed under it, we are unable to see that any contract of exemption has been proved. The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment and the validity of such contract presupposes a good consideration therefor. If the property be in its nature taxable the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. The facts proved must show either a contract expressed in terms, or else it must be implied from facts which leave no room for doubt that such was the intention of the parties and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven and the exemption does not exist. This has been many times decided by this court. (*Tucker* v. *Ferguson*, 22 Wall. 522, 573; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146, and cases cited.)

The different annual ordinances for taxation passed by the common council, exempting from taxation thereunder the leased lots, were but exemptions for the year in which the ordinance was passed, and there can be no plausible claim urged that they, one or all, constituted any contract for exemption beyond the time of each specific ordinance. The statements of officials when lots were sold, that they were not taxable, did not constitute a contract. The lots had not in fact been taxed at the time of these statements and had been annually exempted from taxation, and the statements amounted to no more than opinions of officials as to what would be done in the future. There is no evidence that they had the least power to speak for or to bind the corporation in this behalf. The reports of committees that the lots were not taxable are of the same character—merely the opinions of officials upon a question of law, and not in the nature of a contract.

Upon this question of proof of a contract we quote what was said by the Supreme Court of Georgia in this case upon the last review, through Mr. Justice Lewis:

"Was such a contract shown in the present case? With the view of determining whether or not there was, we have naturally looked to the official action taken by the governing body of the city, either in its ordinances or resolutions providing for the plan upon which the sales were to be made and the consequences and effect thereof, or in its deed of conveyance to the purchaser. Upon examining the various ordinances set out in the record we fail to find any reference whatever to the matter of exempting this property from taxation, and instead of finding any stipulation to that effect in the form of deed invariably made by the city to the various purchasers there appears a clause directly negativing the idea that the city ever intended to grant a perpetual exemption of this property from the burden of taxation. In each instance it was recited in the deed given to the purchaser that the conveyance of the city was made and the rights of the purchaser thereunder were conferred 'subject only to such assessments and burthens as shall be in common with other lotholders in the said city.' The term 'assessment' is often used as a synonym of 'taxes.' Indeed, one of the definitions of this term given by Webster is 'a tax.' But even if this word, as used in the deed, does not necessarily refer to taxation, the word 'burthen,' which is also therein employed, is certainly sufficiently comprehensive to include municipal taxes. Taken all together, the language adopted is clearly broad enough to embrace every burden then existing or which might thereafter be lawfully imposed upon other landowners in the city. The deed was signed by both parties. Here, then, is a specific written agreement made between the parties to the contract relating to the sale of property by the city, whereby it is expressly declared that the property shall be held by the purchaser (and, of course, by his assigns) subject to any burden which might be borne in common by the holders of other lots in the city, necessarily including that of municipal taxation.

"Plaintiffs in error contend, however, that the contract they insist upon is evidenced sufficiently by the conduct of the municipal officers at the time the sales by the city took place. It was shown that when lots were put up for sale the city marshal publicly announced that they would not be subject to city taxes; that this was generally understood by the city at large, and that for nearly a hundred years after these sales first began the municipal authorities failed to tax the lands, and in various ordinances afterwards passed these ground-rent lands were exempted. The effect of these ordinances was merely to grant an exemption from taxes for the particular years to which they related. Mere nonuser by a government of its power to levy a tax, it matters not for how long it continued, can never be construed into a forfeiture of the power. This question was directly passed upon by this court when the case was here before. As to this point, Chief Justice Bleckley said: 'Whatever the expectation of purchasers or the unbroken practice of the city hitherto may have been, the mandate of the constitution of 1877 is to tax all property, save that expressly exempted by the legislature under constitutional authority, if any is taxed. That this mandate may have heretofore been disregarded is no reason why it should not be obeyed now.'

"There is an absolute want of any testimony in the record showing that the mayor and aldermen of the city of Savannah, by ordinance, resolution or official action of any sort, ever authorized the marshal to make the public announcement above referred to in offering for sale the city's property. . . . Besides all this, we fail to find in the record any testimony showing that these particular plaintiffs or any of their predecessors in title bought any of the lots in question under the impression that the same would be exempt from taxes. Indeed, it is not shown that any of these lots were purchased at a sale at which the marshal made such an announcement as that above referred to. The evidence simply goes to the extent of showing what was his custom in this particular and what was the general impression of the public in regard to the matter. For aught that appears, those who actually bought at these sales were fully advised as to the truth with reference thereto, if not prior to the sale, at least before they complied with their bids and accepted the city's conveyance of the lots purchased by them."

We think the opinion correctly states the facts and the law relating to them.

Looking specially at the contents of the deeds executed under the ordinance of 1790, which were signed by both parties, the city and the purchasers, we find that the provision under which the purchasers took the title and by which they were thereafter peaceably and quietly to have possession of the lots was by positive agreement, "subject to all such assessments and burthens as might be in common with other lotholders in the city."

Plaintiffs in error endeavor to give to the word "assessments," contained in the deeds from the city, its more modern meaning of a peculiar kind of tax levied upon lands specially benefited by improvements which are to be paid for by such assessments. The fact is notorious that a century ago special assessments of that kind upon the lands benefited were not usual in this country, and at that time the word was used as synonymous with "rates or taxes," generally. Thus, in a statute passed by the legislature of Georgia in the year 1787, to be found in Watkins' Digest of the Laws of Georgia, 1755–1790, at page 354, it was provided in the fourth section, in speaking of the city of Savannah and the hamlets thereof, "that it shall and may be lawful for the said wardens, or a majority of them, yearly and every year, or oftener, if occasion may require, to make, lay and assess one or more rate or rates, assessment or assessments, upon all or every person or persons who do or shall inhabit, hold, use or occupy, possess or enjoy any lot, ground, house or place, . . . within the limits of the town of Savannah or hamlets as aforesaid, for raising such sum or sums of money as the said wardens, or a majority of them, shall in their discretion judge necessary for and towards carrying this act into execution; and in case of refusal or neglect to pay such rate and assessment, the same shall be levied and recovered in manner as hereinafter directed."

Here is an instance of the use of the word "assessment" at that time in relation to this very city as descriptive of a general tax upon the owners of property within the limits of the city, and to be expended for the general purposes of the corporation. We agree with Mr. Justice Lewis in his construction of this language contained in the deed.

It is further objected in behalf of the plaintiffs in error that the condition that the land was to be subject to assessments, &c., was inserted in the deeds without the authority of the common council, and that the ordinance of 1790 providing for the sale of lots contained no such provision. We think the deeds are substantially in accord with that ordinance, and there is nothing therein inconsistent or at war with the insertion of such provision in the deed; it was but providing for one of the details connected with the sale, and there was an implied power under the ordinance to do so. In addition to that the purchasers took their deeds with such language contained in them, and having themselves signed the deeds they personally agreed to the condition, and took their titles subject thereto. We do not by this mean to intimate that the title would not have been equally subject to the condition contained in the deed by accepting the deed while not signing it; but in addition to the acceptance there is the affirmative act of signing the instrument, and we think the language subjecting the lots to the same assessments and burthens as were laid in common with other lotholders created a valid agreement, and made the lands subject to the same kind of taxation as is levied upon other lots in the city.

The covenant on the part of the city that the purchasers should have peaceable and quiet possession, use, occupation and enjoyment of the lots upon payment of the rent as it became due is in nowise violated by the taxation of the lots in the hands of the purchasers or their assigns. A covenant for quiet enjoyment would not under these circumstances include an exemption from taxation. The purchasers of these lots became to all intents and purposes their owners, as they had the right to their possession, use and occupation forever upon payment of the rent, and they could assign or devise the same, and their assignees or devisees would take good title, and their heirs would also take in case there was no assignment or devise. They could also, at their discretion and on the payment of the money agreed upon, become owners in fee.

Although the city retained the right of re-entry for nonpayment of rent, the character of the title conveyed to the purchasers and their heirs and assigns was not thereby so changed from an absolute fee that the property actually conveyed could not be assessed for the payment of city taxes. The interest of the purchasers was capable of assessment for taxation, and their right was in substance that of ownership. It bears no

resemblance to the case of an ordinary lease for years between landlord and tenant.

In reference to this subject, Mr. Chief Justice Bleckley, in his opinion in this case on its first appearance in the Supreme Court of Georgia, (87 Ga. 397,) at page 399 *et seq.*, said:

"The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true owner of the property for the time being. This holds equally of a city lot or of all land in the world. Where taxation is ad valorem, values are the ultimate objects of taxation, and they to whom the values belong should pay the taxes. Land sold or by a contract of bargain and sale demised forever subject to a perpetual rent, is taxable as corporeal property; and in private hands the rent also is taxable as an incorporeal hereditament. The tax on the former is chargeable to the purchaser or perpetual tenant, and on the latter to the owner of the rent. The corporeal property in such case is at the direct risk of the purchaser; he alone sustains the losses of depreciation in value, and he alone takes the benefit of appreciation. The vendor risks only the fixed rent or the fixed purchase money, and neither of these will ever become more or less by anything which may happen to the premises. Only his security, not his property, will be affected thereby. It is to be assumed that the whole contract between the parties will be observed, not broken, and their true relation to the property is to be determined on that assumption. Possession of real estate attended with an indefeasible right to occupy in perpetuity, and also with an indefeasible right to be clothed with the fee upon the voluntary payment of a fixed sum as purchase money, will constitute the purchaser the substantial owner of the property. So long as his possession, supplemented with these rights, continues, he is not a mere lessee but a purchaser admitted into possession on the faith of his contract of purchase. Such were the contracts involved in the present case, and under them the purchasers have the actual possession and use of the premises, with the right to hold forever, on condition of paying up the purchase money whenever they please, and until that time an annual ground rent due by quarterly instalments, the amount of which is fixed by contract, and is the equivalent of interest at a moderate rate *per annum* on the unpaid purchase money. In all essential respects, so far as liability for taxes is concerned, these purchasers are in the position of ordinary purchasers in possession under a bond for title, and these last are chargeable with accruing taxes on lands so held. (*Bank* v. *Danforth*, 80 Ga. 55.) Not an iota of beneficial ownership in the city lots now in question abides in the municipality. The city but retained a qualified and wholly unproductive title as security for the purchase money and, until that shall be paid, as security also for the annually accruing compensation under the name of ground rents in lieu of interest on that money. If the municipal government held all the values in the city as trustee for the owners, or as security for purchase money, these values would be none the less taxable for that reason. The constitution of the State requires that taxes on property shall be ad valorem, and that when any part is taxed all shall be taxed which is subject for the time being to the taxing power in the given locality. This rule is without exception. It prevails in Savannah. (*Mayor & Aldermen of Savannah* v. *Weed*, 84 Ga. 683.) The

property in question is situate in that city, and, as already said, its beneficial ownership is not in the municipality, but in those who long ago purchased it from the city or who hold under such purchasers by succession to their title. Relatively to the question of taxation, it makes no substantial difference whether the estate or property or beneficial owners be classed as realty or personalty, whatever property of either kind belongs to them is taxable ad valorem. That the so-called ground-rent lots, as long as the conditions of sale are unbroken, are the property of the purchasers follows from what was decided by this court in *Laurence* v. *The Mayor*, (71 Ga. 392,) and that case shows that, even after condition broken, the limit of the city's rights would generally be to have all arrearages cleared and discharged, the surplus proceeds realized by a sale of the property being payable to the real owner. Our reasons for the conclusion at which we have arrived need not be further elaborated. The constitution is imperative that property is to be taxed ad valorem. The foundation principle of such a system is that those who own and enjoy values are to pay the taxes. The real owners of the money which these lots would now sell for on the market are the persons whom we have designated as owners, and it is upon the cash market value that taxes are assessable. If that value is any less, on account of the subjection of the property to ground rents or unpaid purchase money, than it otherwise would be, the fact would no doubt be taken into consideration in making the assessment. The market value, whatever that may be, is the proper basis.

"2. There was no error, either of practice or decision, in denying the injunction. Whatever the expectation of the purchasers, or the unbroken practice of the city hitherto may have been, the mandate of the constitution of 1877 is to tax all property, save that expressly exempted by the legislature under constitutional authority, if any is taxed. That this mandate may have heretofore been disregarded, is no reason why it should not be obeyed now."

We think these views are a correct exposition of the law applicable herein.

We find no element of estoppel in the case. As has been said, the statements of officials made at the time some of the sales may have been effected were nothing more than expressions of opinion, there being no evidence of any agreement on the part of the city or its duly authorized agents to exempt perpetually or at all these lots from taxation for city purposes. The ordinances and the deeds show the transaction and there is no estoppel arising from the language there used. On the contrary, there is evidence of an agreement to pay such taxes.

Such an estate as was created by these deeds does not in our opinion come under the general rule which imposes on a landlord, when the lease is silent upon the subject, the payment of taxes chargeable upon the premises during the term of the lease. Where the purchaser holds real property for a term which may be in perpetuity, upon the condition of paying a certain ground rent, and where he is entitled to a deed conveying the fee at any time on the payment of certain money, he is more nearly described as an owner than he is as a lessee of such property, and he would be liable

to pay the taxes imposed upon the property upon the principle which is set forth in *Sanderson* v. *City of Scranton*, (105 Pa. St. 469,) and *Delaware &c. Railroad Company* v. *Sanderson*, (109 Id. 583.) It is not necessary to decide this question, however, as the specific language of the deed places the burden of paying the taxes on the purchaser and his grantees.

The judgment of the Supreme Court of Georgia was right, and must, therefore, be

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.